**In the Supreme Court of the United States.**

OCTOBER TERM, 1926.

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No. 606.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

*vs.*

AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY, ET AL.

---

No. 709.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

*vs.*

BERWIND-WHITE COAL MINING COMPANY, ET AL.

---

No. 710.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

*vs.*

BETHLEHEM STEEL COMPANY, ET AL.

---

No. 711.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

*vs.*

RAINEY-WOOD COKE COMPANY, ET AL.

---

No. 712.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

*vs.*

PUBLIC SERVICE ELECTRIC AND GAS COMPANY.

---

*APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.*

is granted, and the cases are assigned for argument as one case", on Monday, Feb. 28

**Motion to Clarify Status of These Cases With Reference to Oral Argument and to Secure Adequate Time for Argument by the Respective Litigants.**

Come now the appellees herein, and respectfully show to this Court:—

By reason of the special circumstances set out below, this motion is presented at this time in order that the facts may be adequately presented without taking up the time of the Court on the occasion of the oral argument which has been set for February 28, 1927.

By an order entered on the 6th day of December, 1926, this Court granted the motion of the Attorney General on behalf of appellant, the United States, to advance these several cases, and also specified that they should be heard as one case.

The motion of the Attorney General did not ask that these cases be treated as one case, but only asked that they be advanced and argued together, the motion to advance containing the following:—

> "In each of the five appeals the appellees are represented by different counsel. It is suggested the five shall be heard together as in the District Court, which rendered one opinion covering all. When the cases are called for argument, an application will be made for an extension of time, and request

made that the time allotted, the number of counsel allowed to appear, and the order of argument shall then be fixed."

The motion to advance as made, was acquiesced in by appellees, although this would not have been the case if the motion had suggested that these cases should be treated as one case for the purposes of argument.

This Court's order specifying that these cases should be heard as one case may raise the presumption that these cases become subject to Rule 26 of this Court that appellants on the one hand and appellees on the other are entitled to only one hour for argument and to be heard by not more than two counsel.

These five cases are separate and distinct, and the cases involve to an important extent different states of fact and to a substantial extent different legal aspects, as more fully appears from the following:—

These cases involve the validity of an order of the Interstate Commerce Commission which for the first time seeks to deprive the railroad companies, in times when there are not enough coal cars to meet all the demands, of control over the distribution of cars necessary for procuring railroad fuel, and seeks also to deprive the owners of private cars, at such times, of any use at all of substantial proportions of such cars.

Case No. 606 was brought by certain Railroad Companies, the most important bituminous coal carrying railroad companies of the country, and involved the application of the Commission's order to railroad fuel cars only. The other four cases were brought by four separate classes of owners of private coal cars. The subject matters and the questions of law in the railroad case on the one hand and in each of the private car cases on the other are different in many important particulars.

There are also substantial variations in the situation and relation of the several sets of complainants in the four private car cases, by reason of which separate suits were brought, each dependent upon its own particular state of facts. One case represents integrated industries handling coal in their own cars from their own mines to their own industrial plants; another, public utilities handling coal in their own cars to their own public utility plants from various mines; another, integrated by-product industries handling coal in their own cars to their own plants and also engaged in supplying public utilities with gas for public distribution; another, coal operators handling coal in their own cars from their own mines for distribution to ocean steamships, public utilities and other large users.

We believe that the oral argument of these cases will, in the interest of clear presentation

to the court, call for an exceptional amount of time, by counsel for appellees as well as by counsel for appellants in the adequate presentation of the facts, necessitating, among other things, clear explanation of a complicated subject matter which has rarely been touched upon heretofore in this court, and never in the present aspects, and a full statement of the history of the attitudes of Congress and the Interstate Commerce Commission respectively with reference to all phases of the general subject matter.

Not only are the appellees in the railroad case represented by counsel different from the counsel in the private car cases, but the appellees in each of the four private car cases are represented by counsel different from the counsel in the other private car cases.

On account of the fact that these cases are entirely distinct, on account also of the novelty and complexity of the questions involved, the parties in the respective cases will not be accorded adequate hearing upon the oral argument if the cases are treated as one case.

*Wherefore,* the appellees move that these cases be not treated as a single case within Rule 26 of this Court; that the appellee private car owners be allowed two hours for argument; that the appellee railroad companies be allowed one hour for argument; and that the appellees be

permitted to apportion the time thus allowed among their various counsel, not over two for the railroad companies, and not over three for the private car companies; and that counsel for the United States and the Interstate Commerce Commission, if they so desire, be allowed time for argument corresponding to the time allowed all the appellees.

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# In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 608. UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, v. AKRON, CANTON & YOUNGSTOWN RAILWAY COMPANY ET AL., APPELLEES.

No. 709. UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, v. BEECHWOOD-WHITE COAL MINING COMPANY ET AL., APPELLEES.

No. 710. UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, v. BETHLEHEM STEEL COMPANY ET AL., APPELLEES.

No. 711. UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, v. RAINEY-WOOD COKE COMPANY ET AL., APPELLEES.

No. 712. UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS, v. PUBLIC SERVICE ELECTRIC AND GAS COMPANY, APPELLEES.

## BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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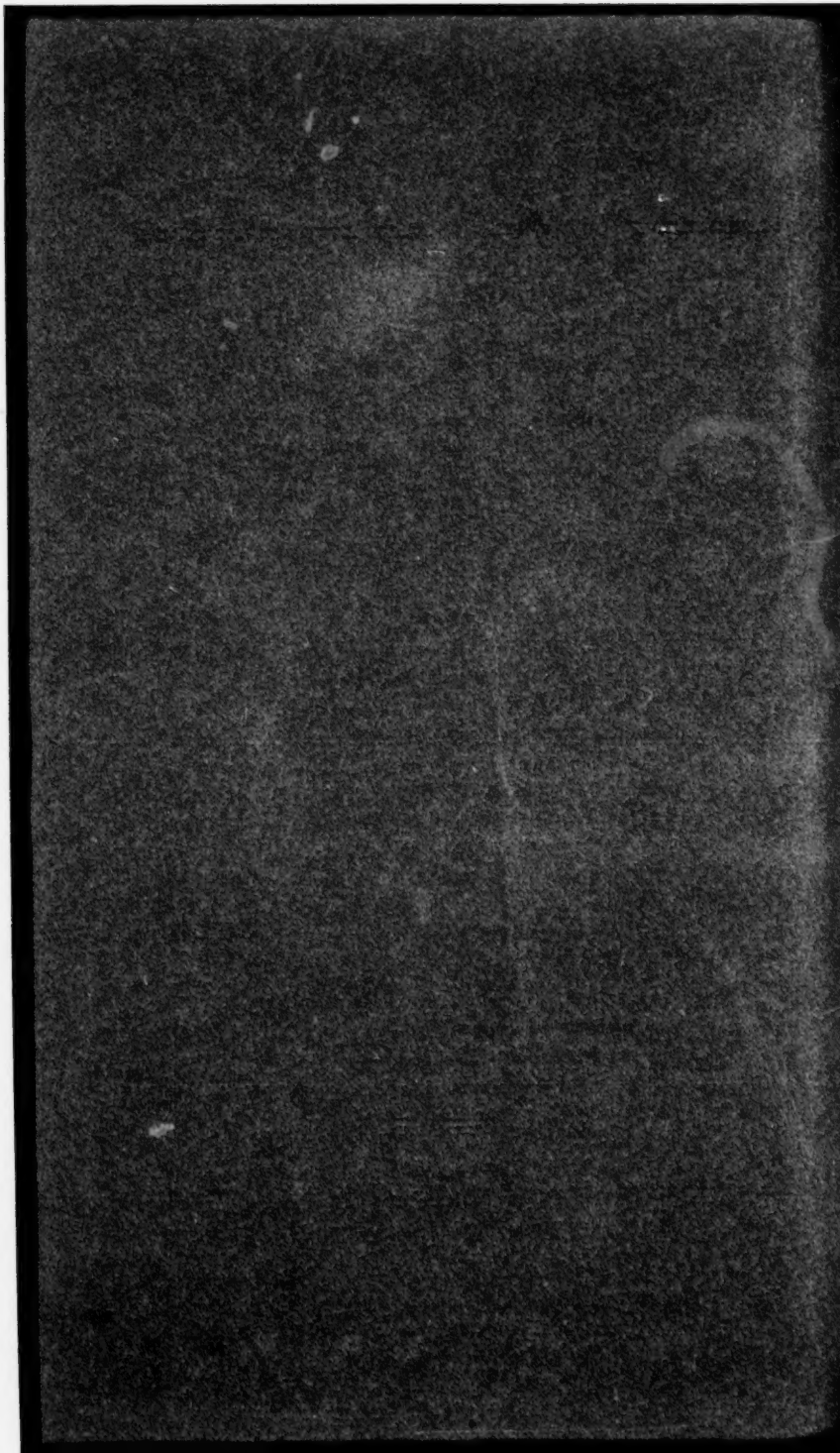

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*v.*

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, APPELLEE

## BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

## STATEMENT

### The appeals

These cases, five in number, are here on appeal under the Act of October 22, 1913 (38 Stat. L. 208,

220), from final decrees of the United States District Court for the Eastern District of Pennsylvania, enjoining the enforcement of an order of the Interstate Commerce Commission dated June 13, 1923 (80 I. C. C. 520), as modified by its order dated December 23, 1924 (93 I. C. C. 701), relating to the distribution of "assigned cars," namely private cars and cars for railway fuel, to bituminous coal mines during car-shortage periods. The opinion of the lower court, which dealt with the five cases together, is reported in *Berwind-White Coal Mining Co. et al.* v. *United States et al.*, 9 F. (2d) 429, and is shown in the record in No. 606, R. 47–75, hereinafter referred to as "Akron R." to distinguish it from the record in the other four cases.

**Preliminary statement**

These cases arose out of a proceeding instituted by the Commission on its own motion on March 22, 1921. All carriers by railroad subject to the Interstate Commerce Act were made respondents. In that proceeding various coal operators, coal associations, and representatives of mine labor vigorously attacked the practice of some of the carriers under what is known as the "assigned car rule." That practice was to place assigned cars, namely cars for railway fuel and privately owned cars, during car-shortage periods, at coal mines in excess of such mines' pro rata share of all cars distributed, based upon the ratings of the mines or orders if less. These opponents of the rule con-

tended that the practice under it violated their rights to fair and equal treatment under the interstate commerce act. They urged, therefore, that the practice be abolished.

Railroads and private car owners defended on the ground that the advantage which they enjoyed by reason of the use of assigned cars was a practical necessity in the conduct of their businesses and that they had the right under the law to continue to use their cars in this manner without interference by the Commission.

The Commission, after full hearings in which testimony covering nearly 5,000 pages was taken and exhibits covering 1,000 more were introduced, condemned the practice and required distribution of assigned cars, as well as other cars, upon a pro rata basis, just as unassigned cars have long been distributed. The Commission, however, did not require private car owners to turn their cars over to others and did not require railroads to forego the use of their cars in obtaining their coal. Its original report and order was dated June 13, 1923 (80 I. C. C. 520). Its second report and order (93 I. C. C. 701) was made on December 23, 1924, after further hearing, and provided that the first order should become effective on March 1, 1925.

The Commission found and concluded that the practice under the assigned car rule was not warranted by any necessity on the part of railroads or private car owners; that while it was claimed and

shown that the advantage to assigned car mines amounted to many hundreds of thousands of dollars, this advantage was at the expense of unassigned car mines and of the public generally because of the increased prices they were required to pay; that assigned car mines by having relatively a much greater car supply than other mines on the same railroad were able to operate at less expense and with more efficient labor organizations than the latter and were thus able to produce and sell their coal at lower prices; that the railroads by giving preferential car supply to mines furnishing them with coal obtained lower prices for such coal and in effect required "payment by the operator to the railroad company for cars by way of reducing the price of fuel coal"; that the mileage allowances which private car owners received from the railroads for the use of their cars were hundreds of thousands of dollars less each year than the owners' expenses in connection with them, but that they were willing to suffer these losses in consideration of the still greater advantages they enjoyed in preferential car supply at mines using such cars; that the act itself gave the Commission authority to deal with "cars irrespective of ownership"; that exclusive contracts for the use of private cars or private ownership of such cars could not prevent the Commission from exercising its power to remove unfair and unjustly discriminatory practices; that railway fuel cars are part of railroad facilities also within its broad ad-

ministrative powers; and that upon the facts shown the practice of giving assigned car mines a preferential car supply under the assigned car rule is clearly unreasonable and unduly preferential and prejudicial.

The Commission made it plain in its report that, irrespective of the theory of private car owners as to the legal status of their cars, the assigned car rule operates to give assigned car mines an unreasonable and preferential share of the services of railroad employees and of facilities other than cars and results in depriving unassigned car mines of services and facilities which otherwise could be used in placing system cars at such mines.

The Commission also made it clear that the "assigned car rule" which was originally prescribed in the *Hocking Valley-Traer cases,* 12 I. C. C. 398, 1907, and 13 I. C. C. 451, 1908, and sustained by this court in *I. C. C.* v. *Illinois Central R. R. Co.,* 215 U. S. 452, substantially restricted the so-called rights of railroads and private car owners to the use of their cars and operated to require pro rata distribution wherever the assigned cars placed at any mine were not sufficient to exceed that mine's pro rata share of all cars distributed, in such case the private cars and railway fuel cars being charged exactly as they are required to be charged under the order here involved. Upon the facts and circumstances existing at that time, the Commission under the assigned car rule permitted mines which

received sufficient assigned cars to exceed their pro rata of all cars to retain the excess. While that rule was designed to bring about substantially equal treatment its purpose was defeated by the practice which developed under it, because carriers and private car owners concentrated their cars at particular mines so as to exceed the pro rata shares of such mines. Such preferential distribution the Commission has now condemned and has thus given effect to the fundamental purpose of the act to provide reasonable transportation service and car distribution, "to compel the carrier as a public agent to give equal terms to all" and "to cut up by the roots every form of discrimination, favoritism and inequality." *New Haven R. R.* v. *I. C. C.*, 200 U. S. 361; *L. & N.* v. *Mottley*, 219 U. S. 467; *U. S.* v. *Union Stock Yard*, 226 U. S. 286, 93 I. C. C. 718.

Of the 3,073 respondent carriers, only 35 have challenged the validity of the Commission's order. They have done so in one of the five cases now before this court. In the other four cases, 25 companies owning or using private cars have also challenged the order. The latter companies own about two-thirds of the 29,000 private cars in this country or only about two per cent of the total open-top coal cars.

The lower court held the Commission's order to be void and enjoined its enforcement. The opinion of that court shows that it disagreed with the Com-

mission as to the necessity of the assigned car rule and as to the expediency and wisdom of such a rule. As we expect to show, it has in substance substituted its judgment for that of the Commission concerning a matter within the latter's administrative authority.

It is difficult to understand how the validity of the Commission's action could be seriously challenged here when the practice which it has condemned, judged by every reasonable standard, is so shockingly unjust and inequitable and when the statute and the decisions of this court construing it so plainly show that this is a matter within the Commission's broad and comprehensive administrative powers.

**The order**

In the Commission's order of June 13, 1923, which as previously indicated was made after extensive hearings (80 I. C. C. 520) and which was finally made effective on March 1, 1925, by its report and order of December 23, 1924, after further hearings (93 I. C. C. 701), it is ordered:

> That each of the respondents be, and each is hereby, notified and required to cease and desist, on or before September 1, 1923, and thereafter to abstain, from maintaining and enforcing, in so far as such respondent maintains and enforces, a regulation or practice whereby in the distribution of cars for the transportation of coal among the bituminous coal mines served by such respondent, whether located upon its line or customarily

dependent upon it for car supply, private cars or cars for the loading of bituminous coal for railway fuel are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal loading currently made to any other of such mines which do not receive private cars or cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars.

*It is further ordered,* That each of the respondents which distributes cars to bituminous coal mines located upon its line or customarily dependent upon it for car supply be, and each is hereby, notified and required to establish on or before September 1, 1923, and thereafter to maintain and enforce a regulation and practice whereby all cars distributed by such respondent to such mines must be distributed on a pro rata basis, and if cars are assigned or consigned to any of such mines and if such cars are placed at the mines to which assigned or consigned, they must be so placed that every mine on the same division or district, established by respondent for the distribution of cars shall receive the same pro rata share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars must be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged.

This order as modified by the order of December 23, 1924, will be referred to herein as "the order" unless otherwise indicated.

**Brief description of the five cases**

In No. 606, 35 [1] of the 3,073 railroads named in the order brought suit to set it aside on the ground in substance that the Commission thereby had imposed an unauthorized restriction upon the placement of private cars and cars for railway fuel at coal mines. (Akron R. 3.) The remaining 3,038 railroads acquiesced in the order, although some of them, including the Illinois Central, the Chicago, Burlington & Quincy, the Southern, the Chicago, Rock Island & Pacific, the Seaboard Air Line, and the Carolina, Clinchfield & Ohio, had favored the assigned car rule in the proceeding before the Commission.

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[1] These 35 carriers are Akron, Canton & Youngstown; Atlanta & West Point; Atlanta, Birmingham & Atlantic; Atlantic Coast Line; Baltimore & Ohio; Boston & Maine; Canadian National; Central New England; Central Railroad Co. of New Jersey; Chesapeake & Ohio; Cleveland, Cincinnati, Chicago & St. Louis; Delaware & Hudson; Delaware, Lackawanna & Western; Elgin, Joliet & Eastern; Erie; Hocking Valley; Lehigh Valley; Louisville & Nashville; Michigan Central; Minneapolis & St. Louis; Missouri-Kansas-Texas; Nashville, Chattanooga & St. Louis; New York Central; New York, Chicago & St. Louis; New York, New Haven & Hartford; New York, Ontario & Western; Norfolk & Western; Pennsylvania Railroad; Pere Marquette; Pittsburgh & Lake Erie; Reading Company; St. Louis Southwestern; Virginian; Wabash; and Wheeling & Lake Erie.

In Nos. 709, 710, 711, and 712, various companies owning private cars brought suits to have these orders enjoined on the ground that they had the right to the exclusive use of such cars and that the Commission's orders constituted an unauthorized restriction upon such rights.

The complainants in No. 709 were the Berwind-White Coal Mining Company and three other coal mining companies (R. 3); in No. 710, the Bethlehem Steel Company and two related companies (R. 154); in No. 711, the Rainey-Wood Coke Company and three other coke companies (R. 231); and in No. 712, Public Service Electric and Gas Company (R. 282). The Steel Company of Canada, the Cleveland Cliffs Iron Company, Perry Iron Company (R. 180), Youngstown Sheet & Tube Company (R. 186), and the United States Steel Corporation, together with eight of its subsidiary companies (R. 172), intervened as complainants in No. 710.

In each of the five cases the United States was made defendant and the Commission was either made defendant or intervened as defendant. The Pocahontas Operators' Association, the Empire Coal & Coke Company, and Pocahontas Fuel Company, Inc., and the Central Pennsylvania Coal Producers' Association also intervened as defendants. All of the defendants filed answers.

In these cases, the railroads and private car owners challenged the validity of the order on the

ground, among others, that the Commission's ultimate findings were not supported by the evidential findings in its reports. In No. 606 the railroads did not contend that the findings in these reports were unsupported by evidence before the Commission. However, the private car owners, in the other four cases, attacked the order on this ground, among others, and therefore introduced in their cases in the court below the evidence taken before the Commission.

**Railway fuel cars, private cars, and system cars**

The Commission had before it the following classes of assigned cars: (1) System railway fuel cars, i. e., those assigned to mines on a coal-loading railroad for its fuel supply, (2) foreign railway fuel cars, i. e., those of another railroad assigned to mines on a coal-loading railroad for the purpose of securing fuel for the former, and (3) private cars, i. e., those owned by shippers and used by the carriers exclusively in the service of such shippers.

System cars, or unassigned cars, are all other cars which are distributed to mines on the carrier's line, whether owned by that carrier or not. (80 I. C. C. 521.)

"The railroads pay to private car owners an allowance of 1.5 cents per mile for use of their cars," and use them "throughout the year, both in periods of car shortage and in periods of full car supply." (93 I. C. C. 736.)

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**System cars have been distributed on a pro rata basis for years**

Ordinarily coal as it is mined is loaded into railroad cars and not stored. If no cars are available the mine must shut down. To those, therefore, who have invested their money in mines the right to reasonable and nonpreferential car supply is of vital concern. Unfair methods of car distribution may seriously impair or utterly destroy such investments. Because of this, carriers have for a long time provided rules for coal-car distribution and, as will be shown later, Congress has conferred upon the Commission comprehensive powers to prescribe reasonable and nonpreferential rules.

For many years railroads have applied, as a fair method of distributing *system* cars, a rule under which such cars are distributed to mines on their lines in proportion to the ratings of the mines, or orders if less; that is, on a pro rata basis. (*Traer Case,* 13 I. C. C. 451; *Hillsdale case,* 19 I. C. C. 356; R. 1553, rule 7.) The rating of the mine, which is fixed by the carrier, represents the approximate average daily capacity of the mine to ship coal by railroad.[2]

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[2] The following will illustrate the rule above referred to: For the sake of simplicity let it be assumed that there are only two mines on a railroad—mine A with a rating of 10 cars, and mine B with a rating of 20 cars; that each orders its rating; and that 15 cars are available for distribution. Under these circumstances there would be a 50 per cent car supply, determined by dividing the total cars available (15) by the total cars ordered (30). Mine A would, therefore, be

Some railroads, however, have not fully applied the pro rata rule just described to cars for railway fuel and private cars. The Commission by the order here under consideration has brought these two classes of cars entirely within that rule.

**The assigned car rule**

In 1907, the Commission in the *Hocking Valley Case,* 12 I. C. C. 398, passed upon a rule under which the two railroads there involved distributed system cars to mines on a pro rata basis; that is, in proportion to the shipping capacity or ratings of the mines, but placed foreign railway-fuel cars and private cars at the mines to which assigned without taking such cars into consideration in determining the pro rata share of such mines. An assigned-car mine thus received its pro rata of system cars and in addition the assigned cars placed there. In the *Traer case,* 13 I. C. C. 451, decided in 1908, the Commission had before it a similar rule applied by three other railroads, but in that case system fuel cars in addition to foreign railway-fuel cars and private cars were involved.

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entitled to 50 per cent of its order, or 5 cars, and mine B to 50 per cent of its order, or 10 cars. It should be noted that in actual practice distribution is not made with mathematical certainty. For example, mine A might actually receive 6 cars instead of 5, and mine B 9 cars instead of 10. But mine A would be shown as one car over, and mine B as one car short. These discrepancies would be equalized by placements on later days. (R. 1554, rule 11.)

The Commission in those two cases laid down what is known the the *Assigned Car Rule* or the Hocking Valley-Traer Rule. That rule is in substance that (1) assigned cars, namely, cars for railway fuel and private cars, must be placed at the coal mines to which assigned; (2) that if the number of assigned cars placed at the mine during a particular period equals or exceeds the mine's pro rata share of the available car supply, it shall not be entitled to any unassigned cars, the assigned cars together with the mine's requirements will be eliminated, and the remainder of the available car supply prorated to other mines, based on a revised percentage by reason of such elimination; and (3) that if the number of assigned cars placed at a mine during any such period is less than its pro rata share, based on a revised percentage, it shall be entitled to receive unassigned cars in addition thereto to make up its pro rata share.

By this rule the Commission required pro rata distribution of private cars and railway fuel cars, with the exception that if the assigned cars placed at a mine exceeded that mine's pro rata share of all cars the mine retained the excess. By reason of the fact that this rule, under conditions then existing, operated to bring about substantially pro rata distribution, the order in the *Traer Case* was attacked in court as being an unwarranted restriction upon the rights of private car owners and upon the rights of railroads to use their cars to obtain

their coal. The rule was sustained by the lower court in respect to private cars and foreign fuel cars but was held to be invalid as to system fuel cars. Appeal to this court as to the lower court's ruling in respect to the latter class of cars led to the decision in *I. C. C.* v. *Ill. Central,* 215 U. S. 452, where the order was sustained as being within the Commission's administrative authority to compel "a just and equal distribution and the prevention of an unjust and discriminatory one."

In *Hillsdale Coal & Coke Co.* v. *P. R. R. Co.,* 19 I. C. C. 356, (1910) the Commission passed upon a somewhat different rule from that which it had before it in the *Traer case.* Under this rule "the capacity in tons of any 'assigned' cars shall be deducted from the rated capacity in tons of the particular mine receiving such cars," and "the remainder is to be regarded as the rated capacity of the mine in the distribution of all 'unassigned' or system cars." The Commission prohibited the rule and prescribed the assigned car rule. The language of the Commission in that report and the examples cited show that the Commission believed that the assigned car rule when substituted for the then existing rule would bring about substantially pro rata distribution, although under the circumstances of that case the Commission did not see fit to prohibit mines which received assigned cars in excess of their pro rata from retaining such excess and it expressed the view that private car owners were

entitled to the exclusive use of their cars. In that case the Commission quoted from the opinion of the court in *Logan Coal Co.* v. *P. R. R. Co.*, 154 Fed. 497, 503, as follows:

> The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata, to shippers desiring their use along the line, upon a basis giving each equal facilities with the other.

Referring to this the Commission said:

> That is the general theory for the distribution of coal car equipment that has appealed strongly to this Commission as being fair, reasonable, and nondiscriminatory.

The Commission further said at page 368–369:

> * * * the contention is that so long as the complainant received all the cars it was entitled to it has no right to complain that some other coal shipper, as the result of a high mine rating or otherwise, secured an excessive proportion of the available cars, if this preference was not at the expense of the complainant. We must reject that view. The act to regulate commerce as amended not only gives a shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier, but gives him the assurance also that no one else shall fair ratably

> better than he does at the hands of the carrier.

It is to be noted that in a dissenting opinion, Commissioner Prouty said (p. 386):

> Probably, in the absence of contract provision thereto, a railroad would have no right to divert the cars of one mine to the use of another, but it might and should decline to put private cars into service except upon condition that there shall be no discrimination of this kind.
>
> This may not be a matter of much importance in the present case. The use of private cars is growing less, and the question will, in all probability, never be a living one.

Commissioner Lane in a dissenting opinion also pointed out that "the whole question of car distribution is in a state of flux."

Other cases in which the Commission prescribed the assigned car rule are set forth in the margin.[3]

**Application of assigned car rule illustrated**

In order to deal with a simple example we shall assume that there are only two mines on a railroad, mine A and mine B, each with a rating of 100 cars. We shall assume further that there are 40 assigned cars, namely private cars or railway fuel cars, for mine A and 100 system cars available for distribu-

[3] *Royal Coal & Coke Co.* v. *Southern Ry. Co.*, 13 I. C. C. 440; *Rail & River Coal Co.* v. *B. & O. R. R. Co.*, 14 I. C. C. 86; *Jacoby & Co.* v. *P. R. R. Co.*, 19 I. C. C. 392; *Bulah Coal Co. v. Penn. R. R. Co.*, 20 I. C. C. 52.

tion. Under the rule which the Commission passed upon in the *Traer Case,* 13 I. C. C. 451, the 40 assigned cars would be placed at mine A and the remaining 100 system cars would be prorated between the two mines, each being given 50. Thus mine A would have 40 private cars and 50 system cars, a total supply of 90 cars, or 90 per cent of its rating, and mine B would have a supply of 50 cars, or only 50 per cent of its rating.

Under the assigned car rule established by the Commission in that case, however, the 40 assigned cars would be taken into consideration. Thus the total cars available would be 140, consisting of the 40 assigned cars and the 100 system cars. The car supply to which each would be entitled would then be determined by dividing the total cars available, namely 140, by the total ratings, namely 200. This would give 70 per cent. Therefore, mine A would be entitled to 70 per cent of its rating, or 70 cars, and mine B would be entitled to 70 per cent of its rating, or 70 cars. Both would receive exactly the same number of cars, namely 70, as compared with 50 received by the unassigned car mine and 90 by the assigned car mine, prior to that decision.

The private car mine by not having enough private cars to furnish itself with a supply in excess of the distributive share would have no advantage from the ownership of its cars over the mine shipping in system cars. Moreover, if mine A had a contract which it expected to fill on the theory of

using the 40 private cars in addition to its 50 per cent supply of system cars, that is, if it obligated itself to give priority to the customer using system cars, it would be deprived of fulfilling its contract with the private car owner, and the latter would have to hold his cars idle, send them to other mines for his coal, or use them in some other manner. Likewise the railroad using assigned cars would have to seek coal elsewhere and would thus have to purchase from other mines, provided sufficient storage of coal had not been arranged for. One consequence of the assigned car rule, as pointed out by Mr. Gutheim, a leading railroad witness, was that "for a number of years after the decision in the *Traer* and *Hocking Valley cases,* which limited to a considerable extent the rights theretofore enjoyed by private car owners, there was a tendency of the private car owners to rid themselves of private cars." R. 806.

Under the circumstances just described, the assigned car rule in effect required pro rata distribution just as the Commission's order here under attack requires such distribution. However, under that rule if the number of assigned cars for mine A were 80 instead of the 40 above assumed, and the number of system cars were 40 instead of the 100 assumed, the car supply percentage would be determined by dividing the 120 cars available, consisting of the 40 system cars and the 80 assigned cars, by the 200 cars ordered. This would give 60 as the

*first* per cent. Mine A would be entitled to 60 per cent of the 100 cars ordered, or 60 cars, and mine B to 60 per cent of the 100 cars it ordered, or 60 cars. The 80 private cars, however, would be placed at mine A and since this number exceeds the pro rata, namely 60, mine A would be eliminated and a *new per cent* computed for the remaining mine, that is, for mine B, by dividing the remaining cars available, namely 40 system cars, by the remaining number of cars ordered, namely 100. This would give 40 per cent. The result would be that mine A in receiving its 80 private cars would have an 80 per cent supply while mine B receiving 40 system cars would have only a 40 per cent supply. Thus by having sufficient assigned cars placed at a mine to exceed its pro rata share, the original purpose of the assigned car rule to bring about substantially pro rata distribution may be defeated.

In the *Hillsdale case* the Pennsylvania was applying a rule under which, if there were 40 assigned cars for mine A and 80 system cars to be distributed, the 40 assigned cars would be placed at mine A; the rating would be reduced by the equivalent of these 40 cars, that is, from 100 to 60 cars, and the 80 system cars would then be distributed pro rata between mine A on the basis of this 60 car-rating and mine B on the basis of its 100 car-rating. The system car per cent would thus be 80 divided by 160, or 50 per cent. Mine A would thus receive 30 system cars, namely 50 per cent of 60 cars, plus its 40 assigned cars, or a total of 70 cars, while mine B would only

receive 50 cars, namely 50 per cent of its rating. Under these circumstances the assigned car rule applied as above explained would give mine A 60 per cent of its 100 car-rating or 60 cars, made up of the 40-private cars and 20 system cars, and would give mine B 50 per cent of its rating, or 60 system cars. In other words, there would be pro rata distribution. If the number of assigned cars were increased so as to exceed the pro rata, the same result would follow as illustrated in the first example above.

As previously indicated the Commission in the proceeding here involved found that the assigned car rule instead of bringing about substantially pro rata distribution had been used in such manner that assigned cars were placed in excess of the shares of the mines at which they were placed and that there was no necessity justifying such treatment. What was originally an exceptional case had become a rule. The Commission by its pro rata order here under attack prevents this inequality and, by a logical development from the principle underlying that rule, brings about pro rata distribution entirely.

**The Proceedings before the Commission**

The proceeding in which the Commission made the order here involved was instituted by the Commission on March 22, 1921, on its own motion,

> into and concerning the reasonableness and propriety of the present car distribution

> rules in so far as they apply to privately owned coal cars and cars furnished for railway fuel coal, with a view to prescribing such just and reasonable rule or regulation as may appear to be necessary.

It was given docket No. 12530. All carriers by railroad subject to the interstate commerce act were made parties respondent.

On June 13, 1923, after extensive hearings and oral and written argument, the Commission issued its first report and order, 80 I. C. C. 520, in which, as above pointed out, it found the practice under the assigned car rule to be unreasonable in violation of section 1 and unduly preferential and prejudicial under section 3, and required distribution on a pro rata basis. Upon petitions of various railroads and private car owners the Commission reopened the case for further hearing. A large volume of additional testimony was taken and many exhibits were introduced in evidence. The entire testimony covered approximately 5,000 pages and the exhibits, about 1,000 more. The case was again argued orally and in briefs. Thereafter, on December 23, 1924, the Commission issued its second report and order (93 I. C. C. 701) in which it adhered to its findings of unreasonableness and undue preference and prejudice contained in its original report and made its order of June 13, 1923, effective on March 1, 1925. That order in the meantime

had been suspended from time to time by other orders of the Commission.

In the above proceeding various private car owners and railroads contended that the assigned car rule should be sustained and that they should be permitted under it to have private cars and railway fuel cars assigned to mines in excess of the pro rata shares of such mines. These contentions were vigorously opposed by individual coal operators, large coal operators' associations and by representatives of organized labor, who urged that distribution on a pro rata basis should be required.

### The Commission's findings and conclusions

The Commission, speaking through Commissioner Aitchison, dealt in its two reports[4] with its authority under the interstate commerce act and reviewed somewhat in detail the evidence upon which it based its ultimate finding of unreasonableness and undue prejudice and preference.

What it said as to its authority will be referred to later under "Argument." Here we shall consider briefly some of its findings as to the effect of, and the claimed necessity for, the assigned car rule.

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[4] The first report covered 42 pages and the second 35. In the first report four out of eleven members of the Commission dissented. These were Commissioners Hall, Daniels, Potter, and Cox. In the second report Commissioners Hall, Potter, and Cox again dissented. In the meantime Commissioner Daniels had been succeeded by Commissioner McManamy, who voted with the majority.

**Effect of assigned car rule**

Before dealing specifically with the effect of the assigned car rule the Commission in its second report[5] said:

> In passing upon the rule before us, it is important to bear in mind the fundamental purpose of the act "to compel the carrier as a public agent to give equal terms to all," "to cut up by the roots every form of discrimination, favoritism, and inequality," and to "place all shippers upon equal terms." *New Haven R. R.* v. *Interstate Com. Com.*, 200 U. S. 361; *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467; *United States* v. *Union Stock Yards*, 226 U. S. 286. We have already noted the Supreme Court's language in the *Illinois Central case* as to our power to require "a just and equal distribution and the prevention of an unjust and discriminatory one." The court also refers in that case to the carrier's "duty to make equal distribution of cars," page 477, and "the duty of equality of treatment," page 473. In *Rail & River Coal Co.* v. *B. & O. R. R. Co.*, 14 I. C. C. 86, 88, which related to assigned foreign railway fuel cars and private cars, we said:
>
> "There is no more insidious or effective way by which a carrier may discriminate between its shippers than through a regulation or

[5] Quotations herein are principally from the second report, since this represents the Commission's final expression after hearing all the evidence and considering all the contentions made.

> practice that denies to them the equal enjoyment of its facilities. And if the rules of carriers with respect to car distribution are not included within the scope of the law, the prosperity of shippers, during periods of car shortage, largely lies in the hands of the carriers on whose lines they conduct their business enterprises, whenever such carriers are disposed to and do actually favor some shippers at the expense of others. * * * The underlying purpose of this legislation, as will doubtless be agreed, was to put shippers on a basis of absolute equality; to assure to them not only equal rates but an impartial enjoyment of the facilities and services of interstate carriers." (93 I. C. C. p. 718.)

After setting forth in some detail the situations in respect to car supply as to certain of the railroads and after referring to other evidence, including testimony "that the use of the assigned car enables the railroad to obtain cheaper fuel at the expense of the public, because with short-car supply at other mines the cost of production is increased, and this increased cost is passed on to the public" (p. 714), the Commission concluded that there was a diminution in the car supply at unassigned car mines as a result of the assigned car rule and that gross inequality of treatment between such mines and assigned car mines also resulted. As to this the Commission said among other things:

> One effect of the assigned-car rule, as we pointed out in our original report, pages 542 to 546, is to diminish the supply of cars

at commercial mines. The extent of the diminution in car supply, as we also pointed out, is in dispute and is difficult to state in mathematical terms. Counsel representing the American Railway Association contend that, while on the whole it seems difficult, if not impossible, to name an exact figure which will represent the percentage of increase in the supply of cars to commercial mines which would be brought about by the abolition of the assigned-car privilege, 3 per cent would be more nearly a correct figure than any other which could be named. Opponents of the assigned-car rule on further hearing introduced further evidence on this phase of the case. This showed, among other things, that, if there had been a pro rata distribution of all cars in the eastern and central regions of the Pennsylvania, which include that portion of the railroad from Cresline, Ohio, east to New York, the supply of commercial mines for the eight months ended April 30, 1923, would have been increased from 34.23 per cent to 54.02 per cent of the commercial cars ordered, or an increase of 57.81 per cent over the supply received by commercial mines during that period. From September 1 to March 1 during this period, the total number of cars available, assigned and unassigned, decreased from 165,016 the first month to 94,280 the last month, and the percentage of assigned cars available to all cars available increased from 25 to 65 per cent. The orders for commercial cars remained almost constant. (93 I. C. C. 718.)

Tables are then set forth showing the situation as to car supply on certain divisions of the Pennsylvania Railroad, certain divisions of the New York Central Railroad, and the various districts of the Chesapeake & Ohio. It is shown for example that during the period from October 19, 1922, to April 30, 1923, the per cent of cars available to cars required on the Cresson Division of the Pennsylvania was, as to railroad fuel cars, 91; as to private cars, 126.1; and as to commercial cars, only 29.8. Similar figures are shown for the South Fork District of the same railroad. The Commission in referring to these said: "* * * If there had been a pro rata distribution of all cars, assigned and unassigned, the commercial supply on the Cresson Division would have been increased from 29.8 per cent to 44.4 per cent, or an increase of 49 per cent, and on the South Fork District from 31.1 per cent to 57.2 per cent, or an increase of 83.9 per cent." (Id. p. 719.) The great disparity between car supply at commercial mines and car supply at assigned car mines is also shown in respect to the other railroads referred to.

On this phase of the case the Commission found and concluded as follows:

> After weighing the evidence in the light of the various contentions made on this phase of the case, we think our former conclusion that the supply of cars at commercial mines would be increased by abolishing the assigned-car rule is fully warranted. This

> effect not only clearly appears from the evidence, but also the gross inequality of treatment as between assigned-car mines on the one hand and unassigned-car mines on the other. (Id. p. 720.)

Concerning costs the Commission said:

> As we pointed out in our original report, page 550, the result of inequality in the running time as between mines receiving assigned cars and those purely commercial is that the cost of operation of the latter must be higher for each unit of production, and the amount of such increased cost is considerable and important. (Id. p. 720.)

As to the shipping and consuming public, the Commission in its first report at the page referred to said:

> * * * As it is the commercial supply of bituminous coal which is restricted by the free use of the assigned car, the increased costs are most sharply felt in coal intended for commercial consumption. It appears of record that during the late war, with the elimination of assigned cars the fuel administration simultaneously lowered the price fixed on all coal 10 cents a ton. The increase in cost because of inequality in running time is largely due to the fact that many of the expenses of the mines are constant; some are reduced but not eliminated by idle time, and the amount of the expenditures eliminated by idle time is proportionately small. The relation between the car supply and these

> costs is immediate. The weight of the evidence is that mine production costs rise because of a diminished car supply, but at a sharper rate. Without attempting to reconcile the conflicting testimony as to the amount of such increased cost, we may safely conclude that it is considerable and important, both to the mine operator and to the consuming public. In weighing the benefits the railroads derive from the assigned car, this indirect cost to the coal-consuming public must be given proper value.

The Commission further found in its second report concerning labor as follows:

> We think it unnecessary to add to what we said in our original report, page 550, as to the effect of the assigned-car practice, in attracting as many desirable miners as can be given employment to the assigned-car mine and away from commercial mines, and in bringing about a more rapid labor turnover at the latter than at the former. (93 I. C. C. p. 721.)

In its original report it said, among other things:

> Out of the mass of conflicting testimony it may be conservatively stated as established that the general effect of the assigned-car practice is to attract as many desirable miners as can be given employment to the assigned-car mine, and away from commercial mines, and particularly so in the unionized fields. The commercial mine has a more rapid labor turnover than the mine operat-

ing with assigned cars. Often these two classes of mines are located close to each other, and the miners paid upon a quantity basis in the commercial mines are rendered discontented when they are compelled to remain idle a large part of the time because of car shortage, while neighboring mines with assigned cars are operating on substantially a full-time basis. This is one factor which has contributed to the unsettled labor conditions in the bituminous mining industry during recent years, and has been urged as a reason in support of the maintenance of existing wage scales or for still higher rates of mine pay. Without attempting to equalize the fortune, opportunities, or abilities of all the bituminous-mine operations or their mine laborers, it seems appropriate to consider this effect of the practice under consideration (p. 556).

As to wastage of equipment, the Commission in its second report said:

> In our original report, page 547, we pointed out that the record indicated that upon the whole the wastage during periods of car shortage, which results from the holding over from one day to the next of cars set for loading, is somewhat greater at mines which use the railroad or private assigned car than at commercial mines. We see nothing in the evidence on further hearing to change our finding on this point. (93 I. C. C. p. 721.)

In dealing specifically with private cars, the Commission pointed out that such cars, being paid for by the carriers through allowances to the owners, are part of the carriers' equipment and subject to the same requirements and prohibitions under the act as other cars. (Id. p. 727.) The Commission then made it clear that one of the effects of the assigned car rule is to give mines using assigned private cars proportionately greater transportation service than unassigned car mines and an unfair share of railroad facilities other than cars. As to this the Commission quoted, among other things, from a report of the American Railway Association Conference Committee to the United States Coal Commission to the effect that "Transportation Shortage" is "more exact or more properly descriptive" than "Coal Car Shortage," and said, among other things:

> As we pointed out in the *Rail and River case*, "A shortage in cars usually if not invariably is accompanied by a shortage in some one or more of the other facilities of the carrier." Locomotives, tracks, employees, terminal facilities, etc., are so related to the number of cars in service that an excessive demand for cars places an excessive burden upon such other facilities. Some of the more aggravated cases of discrimination shown under the assigned-car rule were during car shortages resulting in part at least from lack of motive power and limited track facilities. Some of these cases

were cited by private-car owners as examples of the necessity of the assigned car. As illustrative of this, the United States Steel Corporation, International Harvester Company, Chicago By-Product Company, and Ford Motor Company, through subsidiary companies, operate large mines in the Harlan district of the Louisville & Nashville in Kentucky, and severally own about 4,000 private cars used in serving their respective mines. The evidence shows that this carrier was unable, because of limited track facilities among other things, to handle all the cars required by the mines in this district, and yet private-car mines received practically full car supply while other mines in the district received less than a 30 per cent supply for substantial periods. Other divisions of the same railroad not only had a larger percentage of cars than the Harlan district, but at times during the car shortage it was shown that this carrier notified connections not to deliver empty cars to it.

In determining upon a just and workable rule, we must recognize the fact that car shortages result from a general shortage in facilities, including terminals, motive power, etc., and that to permit private-car owners to have their cars placed at designated mines in excess of the pro rata allotment means that private-car owners will receive more than their fair share of those transportation facilities which they do not own, while to require pro rata distribution of cars is to bring about

> a just and nonpreferential distribution in conformity with the fundamental requirements of the act. (Id. p. 731.)

In its first report the Commission had said, among other things:

> Car shortages are usually accompanied by a condition of alarm on the part of the consuming public, and a demand for the coal which becomes more excited as the coal-car supply lessens. This encourages the opening of the smaller and weaker mines with the recurrence of a poor car supply, and the paradox is presented that as the car supply becomes worse, the capacity of the open mines increases at even a greater rate. This makes more difficult the process of distribution as the cars in service can not be handled as efficiently, nor can as much coal be transported in the aggregate as if fewer mines were demanding service. The increase in demand and mine rating must be met by a pro rata distribution of the available cars, and thus the supply, already diminished because of the lesser efficiency possible in movement, is further diluted in the process of ratable distribution according to the enlarged capacity. The consequence is that in times of car shortage the commercial operators are in the keenest competition for cars. There is also a competition in the demand for cars as between users of coal (p. 547).

Further, as to the discriminatory effect of the assigned-car rule, the Commission in its second report said:

We have already dealt generally with the discriminatory effect of the assigned-car rule as applied to both fuel cars and private cars. Opponents of this rule introduced evidence to show the adverse effect of the rule in respect to private cars, particularly on the Louisville & Nashville, the Chesapeake & Ohio, and the Pennsylvania. It was shown that during car-shortage periods private-car mines received practically a full car supply, while other mines on the same division of the same railroad received a comparatively small percentage of the cars ordered. Private-car owners themselves, in introducing evidence as to the necessity of the assigned-car privilege, showed in many instances the discriminatory effect of the rule. During car-shortage periods mines at which their cars were placed were able because of better car supply under the assigned-car rule to operate more regularly, at less expense, and with more efficient labor organization than such mines were able to operate with system cars only and than other mines similarly situated on the same railroads and depending entirely upon system cars were able to operate. As illustrative of this, the Fordson Coal Company, a subsidiary of the Ford Motor Company, had a car supply of approximately 22 per cent at its mine on the Louisville & Nashville for the six months' period prior to the first placement of its private cars at its mine in February, 1923, and was able to produce only about 34,000

> tons of coal a month, while in March with practically a full supply of private cars it was able to produce about 72,000 tons, although the car shortage continued. The costs per ton were reduced from about $4 in November, 1922, and $3 in January, 1923, to $1.93 per ton in March, 1923, and labor at the mine was better satisfied. During the period when the Fordson Coal Company was dependent upon system cars other private-car owners in the same district received practically a full supply of private cars at their mines. (93 I. C. C. p. 735.)

Striking proof of the extent of the advantage which private-car owners enjoy under the assigned-car rule is pointed out by the Commission as follows:

> Further evidence of the advantage which private-car owners received from the preferential placement of their cars under the assigned-car rule is to be found in the fact that they are willing to lose many hundred thousands of dollars in the operation of their cars in return for the advantage of such preferential placement during car-shortage periods. The railroads pay to private-car owners an allowance of 1.5 cents per mile for use of their cars. This, it was testified, was hardly sufficient to pay the cost of repairs alone. The Westmoreland Coal Company showed, for example, that for the two years and nine months ending September 30, 1923, the revenues received for the use of its 2,019

> cars were $784,424, expenses for repairs amounted to $820,755, total expenses including interest and depreciation amounted to $1,329,488, and the net loss to the company was $545,064, or a loss per ton of coal handled in private cars of 18 cents in 1921, 13 cents in 1922, and 8 cents in the first nine months of 1923. Private-car owners, it is to be observed, use their cars throughout the year, both in periods of car shortage and in periods of full car supply. (Id. p. 736.)

As to the situation, if private-car owners should withdraw their cars from railroad service, the Commission said:

> Furthermore, if private cars should be withdrawn from carrier service and the remaining supply of cars should be inadequate, we have power under the act, as we also pointed out in our report, to require the carriers to furnish an adequate supply. (Id. p. 736.)

The Commission also pointed out that the assigned-car rule if continued would lead to the acquisition of more private cars and would thus result in greater inequality and discrimination in transportation service in favor of assigned-car mines (p. 737).

**Assigned car rule found not necessary**

*Railway fuel cars.*—After pointing out that—

> much of the argument as to economy of operation resolves itself into the proposition

> that a carrier is able to secure cheaper coal as the result of discriminating in its own favor through the use of the assigned car

and after quoting from a former report to the effect that obtaining coal under such circumstances is

> practically a payment by the operator to the railroad company for cars by way of reducing the price of fuel coal

the Commission said:

> Respondents contend that the table in our report of 52 carriers not using assigned cars does not, when considered in view of the evidence which they presented, justify the inference that carriers can secure their coal at reasonable prices during periods of car shortage without the use of the assigned car. However, as to the eight carriers, whose practices were shown on the further hearing, the evidence shows certain significant facts. The Great Northern and Chicago & North Western did not resort to the assigned-car practice in securing their fuel. The St. Louis-San Francisco in securing approximately 73 per cent of its coal from mines on its own line did not follow this practice, and followed it only to a limited extent, if at all, in securing the remainder of its coal from mines on other lines. The Atchison, Topeka & Santa Fe secured over one-third of its supply of coal without the use of assigned cars. The Carolina, Clinchfield & Ohio did not follow this practice in 1920 or in October, 1922, although it did do so the

latter part of that year. During 1920 and until the latter part of 1922 the Seaboard Air Line obtained practically all of its coal without assigned cars. The Delaware, Lackawanna & Western obtained 40 per cent of its coal in this manner. Our table shows that the Atlantic Coast Line and the Detroit & Mackinac did not follow the assigned-car practice in 1920 and were not following the practice on October 1, 1922, and that the Richmond, Fredericksburg & Potomac, while following the practice in 1920, was not using assigned cars on October 1, 1922. This showing remains uncontradicted, except that in the latter part of 1922 the first two carriers secured coal on the Chesapeake & Ohio in cars placed under the assigned-car rule, while the third carrier continued to secure its coal on that road without assigned cars. As to the remainder of the 52 carriers listed in our table as not using assigned cars, the showing made therein is neither contradicted nor modified. Among these are certain important roads like the Union Pacific, the Buffalo, Rochester & Pittsburgh, and the Mobile & Ohio.

The evidence on further hearing as to carriers other than those shown in our table furnishes in many instances added support for the conclusion that carriers in car-shortage periods may secure their coal at reasonable prices without the use of the assigned car. As illustrative of this, the Chicago, Burlington & Quincy, between the time of the original hearing and the further hearing

in this case, secured over half of its coal without the use of assigned cars, during a period of sustained car shortage. This was true also in previous car-shortage periods, as shown at the original hearing. The New York Central secured about 26 per cent of the coal it consumed without the use of the assigned car. The Pittsburgh & Lake Erie, a part of this system and an important coal-loading carrier, did not follow the assigned-car practice in securing its fuel in the year 1920. The Michigan Central, also a part of the system, secured, since the period of Federal control, a substantial portion of its fuel in Michigan without the use of assigned cars, and from 1912 to 1917 procured all of its coal without assigned cars. (93 I. C. C. p. 722.)

Further, as to the practicability of doing without the assigned-car rule the Commission said:

> Many large and important carriers in representative sections of the country have secured their coal during periods of car shortage without resorting to the use of assigned cars, and many others have secured large portions of their fuel supply in the same manner. The evidence in the original record and upon the further hearing also shows that public utilities and quasi public utilities have been able to secure their coal without the use of the assigned cars. We pointed this out in our report, pages 552 and 553.

> There is a large volume of evidence in the original record and in the record upon the further hearing as to the methods which carriers adopted, and which they could adopt in securing their fuel without the assigned-car rule. These include greater storage of coal during periods of inactive demand and a wider distribution of fuel contracts among producing mines, with a provision in some cases that railroad coal shall be delivered in preference to coal for other customers. While the carriers contend that these methods are impracticable as substitutes for the assigned-car rule, the experience of carriers and other public utilities and quasi public utilities, which do not depend upon this rule in securing all or a large part of their fuel, and the other evidence in the record on this subject, convince us of the practicability of securing railway fuel at reasonable prices in the absence of the assigned-car rule. (Id. p. 723.)

It then referred to its emergency powers as follows:

> As stated in our original opinion, however, emergencies may arise when for a time a carrier may be unable to secure its coal. But we are not here dealing with the question of car distribution under the emergency provisions of section 1, paragraph (15). In our original report we expressly pointed out that the rule which we prescribed was not to preclude us from authorizing necessary assignment of cars in case of emergency. The

> question of a just and nondiscriminatory rule under the provisions of section 1 and section 3, with which we are now dealing, is a different question from that of a rule to be prescribed in case of emergency. The distinction is recognized in paragraph (15), where it is provided that we may suspend car-service rules at such times. (Id. p. 724.)

The claimed losses to carriers if the rule should be abolished are dealt with as follows:

> In the petition for rehearing filed by the American Railway Association it was alleged that the abolition of the assigned-car rule would add more than $100,000,000 a year to the operating expenses of the carriers, which must ultimately be met by the public. No figures were offered to show how this sum was computed, and there was a general failure of evidence to support this contention. As we have previously indicated, carriers which have not used the assigned-car rule in securing all of their coal, or a large part thereof, have been able to do so at fair prices. Moreover, as the result of inequality in working time caused by the assigned-car rule the costs of commercial mines are increased and the public in consequence must pay higher prices for coal. We referred to this in our original report, pages 550 and 551. It seems probable that, as one of the consequences of abolishing the rule, carriers will increase the storage of coal during periods of free car supply and thus not only secure coal at low prices but make more

> equipment available for revenue service during periods of car shortage. The evidence shows that many carriers, as well as public utilities and important industries, store large quantities of coal and are able to do so at reasonable expense. Storage by railroads and others in periods of car surplus tends to equalize the demands by operators on railway equipment throughout the year, and to prevent periods of extreme car shortage during which, because of the great demand for coal, inefficient high-cost mines spring into operation, and the public is required to pay excessive prices for coal. (Id. p. 724.)

*Private cars.* As to the necessity of the assigned car rule as applied to private cars, it should be noted that the Commission found that the total number of coal and coke cars privately owned as of October 1, 1923, was only 29,296. (Id. p. 727.) This is only about 3 per cent of the total open-top coal cars in this country (R. 1025, 1495). Appellees own only about 19,500 of the 29,296.

In dealing with the claimed necessity of using private cars under the assigned-car rule, the Commission said, among other things:

> While all of them contend that private assigned cars are necessary in their industries and in some cases allege that disaster will result if they are deprived of the assigned-car privilege, the record shows that many of such owners secure large quantities of coal without the assigned car. As illustrative of

this, the Carnegie Steel Corporation and other subsidiaries of the United States Steel Corporation normally receive by rail 20,000,000 tons of coal annually, one-half of which is used in their mills for producing gas and steam and one-half in their by-product coke ovens. These companies own 5,200 coal cars. Of the 20,000,000 tons 5,000,000 are moved in these cars. About 12.5 per cent of the 10,000,000 tons of coal for gas and steam and about 37.5 per cent of the 10,000,000 tons used for by-product coke are moved in this manner. Another illustration is to be found in the Pittsburgh Plate Glass Company, which owns about 269 cars and uses them in securing coal for its plants in the Pittsburgh district, but obtains coal in system cars for its other plants in Indiana, Ohio, and Missouri. The Youngstown Sheet & Tube Company obtains 49 per cent of its coal in system cars. This includes both high-volatile and low-volatile coking coal. The New York Edison Company and the Consolidated Gas Company of New York each receives about two-thirds of its coal in system cars. Large quantities of coal are secured by private-car owners from mines on the Norfolk & Western, which does not handle private coal cars during car-shortage periods or at any other time. The evidence presented showed that many public utilities, including street railways, obtained their coal without private cars. It further shows that many mines in the districts where private

cars are used produced coal for by-product coke, bunker coal, and other kinds of coal in competition with that moved in private cars.

It is to be observed that many of the private-car owners appearing in this case did not purchase cars until the abnormal period following the termination of Federal control of railroads. The following companies, for example, first acquired their cars in 1920: Steel Company of Canada and affiliated companies, International Harvester Company and its subsidiary company, Bethlehem Steel Company, Youngstown Sheet & Tube Company, and Seaboard By-Product Coke Company. The Pennsylvania Coal & Coke Company acquired its 1,000 cars between the time of the original hearing in this case and the further hearing. The president of this company at the original hearing opposed the use of private cars. 1,004 cars of the Ford Motor Company and its subsidiaries were also acquired subsequent to our original hearing in this case. (Id. p. 734–735.)

The Commission had previously pointed out the practice by steel companies and by-product coke companies of storing large quantities of coal, two months' supply for example, "to guard against a breakdown in transportation or trouble at the mines" and "to take care of their requirements during any ordinary period of irregular coal supply or interrupted transportation service." (Id. p. 733.)

It also said that the record justified the statement by many of the private car owners in their brief that:

> While it is a fact that since 1916 coal car shortages have been common, that is not the normal situation. Once we are out of our war and *post* war difficulties, the opposite condition, one of coal car surplus, may be more regularly contemplated. (Id. p. 735.)

Its conclusion on this phase of the case was as follows:

> The fundamental problem is to determine whether differences in transportation conditions justify the inequality of treatment resulting from the assigned-car rule. The evidence which has been presented as to the economic necessity of individual shippers or classes of shippers does not, we think, warrant us in concluding that this inequality of treatment is justified under the provisions of section 1 and 3 of the act. Compare *Rates and Charges on Grain and Grain Products,* 91 I. C. C. 105. In case of emergency we may grant relief under the provisions of paragraph (15), section 1. What is reasonable action under that section, however, as we pointed out in our discussion of fuel cars, is a different question from the one presented here. (Id. p. 735.)

**The Commission's ultimate findings**

Before setting forth its ultimate findings the Commission made it plain that its order does not require carriers to forego the use of cars for secur-

ing railway fuel and does not require private cars to be used by others than their owners. As to private cars it said:

> In our original report we did not find that the use of private coal cars should be prohibited or that they should not be placed at the mine to which they were consigned. What we did prohibit was the placement of such cars at a mine in excess of the pro rata share of available cars. Private-car owners were left free to continue to use their cars and to have them so distributed to designated mines as not to exceed the pro rata share of such mines. (Id. p. 737.)

Its ultimate findings were as follows:

> Upon the facts shown of record we affirm the findings in our former report, 80 I. C. C. 520, and find and conclude that in the distribution of cars for transportation of coal among the bituminous coal mines served by the respective respondents, and each of them, whether located upon the line of a respondent or customarily dependent upon it for car supply, or whether owned or leased by or furnishing their entire output to a respondent, any rule, regulation, or practice of the respondents, or any of them, whereby private cars or cars for the loading of bituminous coal for railway-fuel purposes are placed at any such mine in excess of the pro rata allotment and distribution of cars for coal loading, currently made to any other of such mines which do not receive private cars or

cars for railway fuel and which are on the same division or district established by such respondent for the distribution of cars, is and for the future will be, unjust and unreasonable, and unduly and unreasonably preferential of such mines receiving private cars or cars for railway fuel in excess of such allotment, and unjustly discriminatory against and unduly prejudicial to such other mines not receiving private cars and cars for railway fuel. We further find and conclude that all cars should be distributed by such respondent to all mines on such district or division on a pro rata basis; and that if cars are assigned or consigned to any of such mines, and if they are placed at the mines to which they are assigned or consigned, they should be so placed that every mine on the same division or district should receive the same pro rata share of the total number of available cars, whether assigned, consigned, or unassigned, which are distributed to all mines on such division or district, and that all such assigned or consigned cars should be counted and charged against the mines at which they are placed in the same manner and to the same extent that unassigned cars are counted and charged. It is not intended that this finding shall prevent the assigning of privately owned cars or cars for railway fuel to designated mines, provided such mines are not thereby given more than their pro rata share of available cars. It is also not intended that this finding shall preclude

> the commission hereafter, in proper cases, in the exercise of the emergency powers conferred upon it by paragraph (15) of section 1 of the act, from requiring the placement of cars for bituminous-coal loading at any mine or mines in excess of the current percentage allotment made to mines generally upon the lines of the same carrier, or upon the same division, when the order or direction for placement shall so provide. (Id. p. 737.)

**Opinion of the lower court**

Much of the opinion of the lower court is apparently devoted to showing that, contrary to the Commission's finding, the assigned car rule is a necessity. The court seems to have been particularly impressed by allegations in the bills of complaint as to the large sums invested in private cars and the character of coal used by private car owners. It concludes that—

> This valuable legal right in the ownership of private cars * * * furnishes the only means by which the car owners can procure an adequate fuel supply in periods of recurrent car shortage. (Akron R. 60.)

It also apparently holds that the railroads can not reasonably do without the assigned car rule by a wider distribution of fuel purchases, preferential contracts, or storage. (Akron R. 70, 71.)

Apparently relying upon allegations in the railroads' complaint the court states that "many of the plaintiffs have equipped themselves with coal

cars of special design not available for commercial use" (Akron R. 50), although the Commission in its report found that the only cars as to which such a claim was made, i. e., those of the Atchison, Topeka & Santa Fe and the Hocking Valley, "constitute part of the available equipment of these carriers for commercial shipments." (93 I. C. C., p. 725.)

The court takes the view contrary to that of the Commission, that the order will not result in increased car supply at commercial mines. As to this, it says, among other things:

> While [as to private cars] the Commission has power to regulate their use for their owner's purposes by a lawful order, their distribution to other shippers in order to bring about a greater pro rata allotment would be confiscatory and beyond the power conferred by Congress, and the theory of an increased pro rata allotment is, therefore, untenable. (Akron R. 72.)

Whether the court means this to apply also to railway fuel cars is not clear. Its conclusion is apparently based upon the assumption that a private car owner although having control of his cars will not keep them in use, and thus in revenue service, by having them distributed to mines in such manner as not to exceed the pro rata shares of such mines. It is also apparently assumed that if a private car mine does not receive private cars in excess of its pro rata share, railroad labor and facilities other than cars will not be devoted to a greater extent in placing cars at unassigned car mines.

Much stress is laid by the court upon what it regards as the "rights" of private car owners.[6] The conclusion is reached that

> The Commission * * * has, by its order, * * * abolished the use of private coal cars, except subject to the pro rata distribution prescribed, for the only practical purpose to which they may be put, and has thereby deprived the private car owners of the full use and enjoyment of their rights to operate their mines and of their full rights under their contracts to supply themselves with coal from other mines. (Akron R. 60, 61.)

The court had previously expressed the view that the effect of the order is that private cars or railway fuel cars in excess of the pro rata of the mine to which assigned "must either stand idle on the sidings or will be appropriated for the use of others than their owners." (Akron R. 59.)

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[6] Note that the court in its decision (Akron R. 60) mistakenly quotes the Commission as saying the following concerning the rights of private car owners, when it was said in the dissent of Commissioner Potter: "The Congress has thus recognized the use of the privately owned cars and has limited our power to touch that right to our power over the carriers. We can not declare that right unreasonable or unjustly discriminatory, or unduly prejudicial or unlawful, because of something that is inherent in the nature of that right, because by so doing we would be abrogating a right which the Congress has recognized and which we have stated could only be abrogated by appropriate legislation." (93 I. C. C. p. 749.)

It was further held that the "practice under the Assigned Car Rule is not per se preferential or discriminatory" (Akron R. 73) and that

> If the discrimination found by the Commission is based upon the disadvantage to the commercial mines through the use and enjoyment by the railroads and private car owners of assigned cars in excess of the general distributive shares of their mines, the Commission has plainly exceeded its power in an attempt to regulate the bituminous coal mining industry. (Akron R. 73.)

After referring to the question of discrimination as the result of insufficient "motive power, track, and terminal facilities, and employees," the court holds that

> * * * findings of actual discrimination and preference, granting that they are sufficiently established to justify orders of the Commission prohibiting the carriers from pursuing such practices, are not sufficiently general in their scope nor substantial in their result to support the sweeping order of the Commission. (Akron R. 74.)

At the end of its opinion the court summarizes its conclusions as follows:

> We conclude that the order of the Commission is unjust and unreasonable and an unlawfully arbitrary exercise of power; that it undertakes by indirection to regulate the

soft coal industry in matters which do not constitute transportation service relating to commerce and are not within the regulatory power of the Commission; that it assumes without authority of law to restrict the lawful right of the railroads to obtain by purchase or ownership of mines the supplies necessary to their operation in the service of the public; that the use of the railway fuel cars and private cars under the assigned car rule is not per se preferential; that there are no sufficient facts set out in the Commission's report upon which to base findings of such discriminatory and preferential practices as to justify an order of universal application such as has been entered in this case; that it is confiscatory in violation of the fifth amendment of the Constitution in depriving the railroads of the use of their mines and the private car owners of the use of their mines and cars; that the order is, therefore, beyond the authority of the Commission, without warrant of law, and null and void. (Akron R. 74.)

**Points relied upon**

The Commission's assignments of error (R. 143, 222, 273, 312, and Akron R. 76) and designation of points to be relied upon (R. 1633, 1636, 1639, 1642, and Akron R. 87) may be condensed as follows:

1. The court erroneously held that the Commission arbitrarily exercised its authority to require

rules of car distribution and exceeded its powers under the law.

2. The court erred in substituting its judgment for that of the Commission as to matters of car distribution within the latter's lawful discretion.

## ARGUMENT

### I. THE POWER TO PRESCRIBE RULES REQUIRING PRO RATA DISTRIBUTION OF COAL CARS, INCLUDING PRIVATE CARS AND CARS FOR RAILWAY FUEL, IS VESTED IN THE COMMISSION

#### a. Provisions of the statute

The authority of the Commission over the distribution of cars by carriers subject to the act is to be found in sections 1, 3, and 15 of the Interstate Commerce Act. Section 1 requires reasonable rules of car distribution, section 3 forbids unduly preferential or prejudicial rules, and sections 1 and 15 authorize the Commission to prescribe just and reasonable rules. The pertinent provisions of these sections follow:

> *Section 1 (3).* * * * The term "transportation" as used in this Act shall include locomotive, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, *irrespective of ownership* or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, * * * and handling of property transported.
>
> *Section 1 (4).* It shall be the duty of every common carrier subject to this Act engaged

in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor. * * *

*Section 1 (6)*. It is hereby made the duty of all common carriers subject to the provisions of this Act to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * the facilities for transportation * * * and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this Act which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this Act upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful.

*Section 1 (10)*. The term "car service" in this Act shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this Act.

*Section 1 (11)*. It shall be the duty of every carrier by railroad subject to this Act to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices

with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

*Section 1 (12).* It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. * * *

*Section 1 (14).* The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

*Section 3 (1).* That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, cor-

poration, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

*Section 15 (1).* That whenever, after full hearing, upon a complaint made as provided in section 13 of this Act, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, * * * the Commission shall be of opinion that * * * any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this Act, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, the Commission is hereby authorized and empowered to determine and prescribe * * * what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, * * * and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

**b. Many decisions of this court show that the Commission, under its authority to prescribe reasonable and nonpreferential coal-car distribution rules, may require private cars and cars for railway fuel to be distributed on a pro rata basis**

Even before the transportation act, 1920, inserted in the interstate commerce act new provisions putting the railroad systems of the country "more completely than ever under the fostering guardianship and control of the Commission which," among other things, "is to supervise * * * their car supply and distribution" (*Dayton Goose Creek case,* 263 U. S. 456, 478), this court clearly established the authority of the Commission to require pro rata distribution of coal cars, including private cars and cars for railway fuel.

One of the cases in which this was made plain is *Morrisdale Coal Co.* v. *Penn. R. R. Co.,* 230 U. S. 304. There action for damages was brought by a coal company, alleging discrimination by the Pennsylvania Railroad in the distribution of coal cars. Plaintiff's mine had a capacity which was 4.8 per cent of the entire output of the Clearfield Region served by the railroad. The claim for damages was based upon the fact that the railroad failed to give this mine its pro rata share, i. e., 4.8 per cent of "all the coal cars," including private cars, foreign railway fuel cars, and system fuel cars in that region, but instead first deducted the private cars and cars for railway fuel and then distributed the remaining cars on a pro rata basis to plaintiff's mine.

The railroad's practice was in accordance with its own rule of car distribution.

In holding that the Commission had exclusive authority to determine whether, "as a general rule, or under the peculiar conditions prevailing on defendant's road at that time," "all cars in the district should be distributed according to the capacity of the mine, without deducting private cars, foreign fuel cars, or the carriers own fuel cars," and that "plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable," this court in an opinion by Mr. Justice Lamar, said, among other things:

> *The prohibitions of section 3 of the commerce act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair prejudice. But the statute does not define what is the proper method of distribution in the case of car shortage,* and at the time of the transactions out of which this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. As late as 1910, it was said (19 I. C. C. 387) that the question was in a state of flux, and an examination of the decisions in the numerous cases brought about that time will show that it was a matter about which there was much difference of opinion. In some cases it was held that private cars and fuel cars of foreign railroads consigned to particular mines should be *counted* in

making the distribution. Others held that such cars should be *counted,* but that if the foreign cars, or those owned by the private corporations, exceeded their percentage, the excess might be retained by those coal companies. This view was adopted by the Commission, which also held that fuel cars belonging to the carrier should be counted except where the railroad purchased the entire output of the mine. (P. 312. Italics ours.)

The *Traer case,* 13 I. C. C. 459, and other decisions of the Commission were then referred to and it was said:

> These rulings as to the validity of a particular practice and the facts that would warrant a departure from a proper rule actually in force are sufficient to show that the *question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission.* It was distinctly so ruled in the Pitcairn case (215 U. S. 481) and in Interstate Commerce Commission v. Illinois Central R. Co. (215 U. S. 452). Those cases involve a consideration of the power of the Commission over the distribution of cars and held that the courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. *If in those direct proceedings the courts could not pass upon the question of reasonableness of a method of*

> *allotting cars neither can it do so as* an incident to an action for damages (p. 313. Italics ours.)

While fully recognizing the manner in which the Commission had required private cars and railway fuel cars to be taken into consideration in the *Traer case* and similar cases, this court made it clear at page 314 that the Commission's authority extends to requiring distribution of all cars, including private cars, system fuel cars, and foreign fuel cars, on a pro rata basis, in the very manner provided in the order here under attack:

> * * * it was admitted at the hearing that there had been no discrimination against the plaintiff in the application of the rule, the complaint being that the basis of allotment was unreasonable and that *all cars in the district* should be distributed according to the capacity of the mine without deducting private cars, foreign fuel cars, or the carrier's own fuel cars. Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time was, as we have seen, an administrative question and to be decided by the Commission as preliminary to the right to maintain this suit. The Circuit Court rightly held that until this was done, it had no jurisdiction as a Federal court of the cause of action sought to be enforced. (Court's italics.)

As previously pointed out the Commission's order in the *Traer case,* 13 I. C. C. 451, was sus-

tained by this court in *I. C. C.* v. *Illinois Central R. R. Co.*, 215 U. S. 452, cited above in the *Morrisdale case*. The lower court in that case sustained the order in so far as it applied to private cars and foreign railway fuel cars, but set it aside in so far as it applied to system fuel cars, *C. & A.* v. *I. C. C.*, 173 Fed. 930. Upon appeal by the Commission this court reversed the lower court as to its ruling concerning system fuel cars but did not disturb its ruling as to foreign railway fuel cars and private cars, although it was contended that the order "deprived the owners of such cars of the right to the use of their property" (p. 466). The power of the Commission to require private cars and railway fuel cars to be taken into account under the assigned car rule was made clear.

Mr. Justice White in delivering the opinion of the court pointed out that the "power to make the order and not the mere expediency or wisdom of having made it, is the question" (p. 470); that system fuel cars although claimed to be withdrawn from common carrier service were within the "governmental power * * * of compelling a just and equal distribution and the prevention of an unjust and discriminatory one"; that the contention that the application of the rule required the carrier to change its contractual arrangements for coal was unsound, because it overlooked " the fact that that regulation addresses itself, not to the right to purchase, but to the duty to make equal distribu-

tion of cars" (p. 477); and that "it is beyond controversy that the subject with which the order dealt was within the sweeping provisions of section 3 of the act to regulate commerce prohibiting preferences and discriminations" (p. 475).

It is to be observed that this court while noting that the rule permitted assigned car mines to retain the excess when the assigned cars placed exceeded the pro rata share of such mines, nevertheless dealt with the rule as bringing about substantially pro rata distribution.

In referring to the contentions of the railroad that the effect of the order was to discriminate against mines furnishing it with coal, the court said, page 478:

> * * * At best, these arguments but suggest the complexity of the subject, and the difficulty involved in making any order which may not be amenable to the criticism that it leads to or may beget some inequality. Indeed, the arguments just stated, and others of a like character which we do not deem it essential to specially refer to, but assail the wisdom of Congress in conferring upon the commission the power which has been lodged in that body to consider complaints as to violations of the statute and to correct them if found to exist, or attack as crude or inexpedient the action of the commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils. * * *.

In the *Pitcairn case,* 215 U. S. 481, also cited in the *Morrisdale case,* supra, it was said "we see no escape from the conclusion that the grievances complained of " namely that the railroad did not distribute cars, including private cars and railway fuel cars, to mines on a pro rata basis (p. 49) "were primarily within the administrative competency of the Interstate Commerce Commission and not subject to be judicially enforced, at least until that body, clothed by the statute with authority on the subject, had been afforded by a complaint made to it the opportunity to exert its administrative functions." Since the Commission had not passed upon and required such a rule of distribution, it was held that mandamus would not issue from a court to bring about its enforcement.

In *Pennylvania Railroad Co.* v. *Puritan Coal Mining Co.,* 237 U. S. 121, this court affirmed a judgment for damages arising from the fact that the plaintiff failed to receive the number of cars to which it was entitled under the carrier's own rule. In an opinion by Mr. Justice Lamar it was said at page 131:

> But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised

> which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement.

Later in the opinion it was said, at page 133:

> The law exacts only what is reasonable from such carriers—but, at the same time, requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not, identically. In determining how the inadequate supply shall be distributed, it might be necessary to consider the character of the freight tendered—whether perishable or staple and whether a necessity of life needed in crowded cities and the like. In the distribution of cars to coal companies it might be necessary to determine whether account should be taken of system cars, foreign cars, private cars and the company's own coal cars. In many cases the determination of such an issue would call for the exercise of the regulating function of the Commission. That was true in *Morrisdale Coal Co.* v. *Pennsylvania Railroad,* 230

> U. S. 304, 312–314 * * * The reasonableness of the rule was a matter for the Commission.

In *Pennsylvania Railroad Co.* v. *Stineman Coal Co.*, 242 U. S. 298, it was held that suit for damages could not be maintained for the failure of the Pennsylvania Railroad to distribute cars in compliance with the rule which was in effect at the time the cars were actually distributed but which was later condemned by the Commission in the *Hillsdale case*, 19 I. C. C. 356, supra. In referring to the Commission's action, this court, speaking through Mr. Justice Van Devanter, said, among other things:

> The Commission deemed it essential to a fair distribution in times of car shortage that individual cars, owned or controlled by the shipper [namely, private cars] should be charged against his distributive share, and because the rule here took no account of such cars the Commission found that it was unjustly discriminatory. (p. 301.)
>
> * * * The purpose [of the Commission's proceeding] was to determine the character of the rule for the equal benefit of all, to the end not only that discrimination thereunder in the future might be prevented, but also that such discrimination in the past might be redressed. So understanding the act, the Commission, upon finding the rule unjustly discriminatory, ordered the carrier to cease giving effect to it and also recognized that shippers who had been injured through its operation in the past

> were entitled to reparation. And the Commission proceeded to award reparation to such shippers as appeared and adequately proved their injury and the amount of damages sustained. (p. 302.)

Continuing this court referred to the inherent reasonableness of a rule requiring private cars to be charged:

> Not only so, but the Commission's report made it plain that *the finding was not based upon any temporary or changeable condition existing at the time but upon what inhered in the rule and therefore was true from the time of its adoption.* The legal propriety of the Commission's finding is not questioned, but only that it operates to discredit the carrier's rule as respects earlier transactions.
>
> In the circumstances stated we are of the opinion that effect must be given to the Commission's findings, even though it came after the transactions in question, and that a recovery by the coal company cannot be permitted without departing from the uniformity and equality of treatment which the act is intended to secure. Only through an enforcement of the discriminatory rule, and of the particular feature which made it discriminatory can a recovery be had. (p. 302. Italics ours.)

See also *Pennsylvania Railroad* v. *Clark Coal Co.*, 238 U. S. 456; *Pennsylvania R. R. Co.* v. *Minds*, 250 U. S. 368, affirming judgment for damages in

a suit based upon the assigned car rule prescribed in 20 I. C. C. 52; 23 I. C. C. 186, 192; and *Pennsylvania R. R. Co.* v. *Weber,* 257 U. S. 85, where in affirming a judgment for damages based upon a similar decision of the Commission in 19 I. C. C. 392, this court said, among other things:

> * * * there is testimony tending to show that had the cars been distributed upon a basis *of general equality* approved by the Commission, and without resort to practices condemned by it, there would have been cars enough to have furnished plaintiffs with a sufficient numbe to meet their trade and requirements during the period in question. Under the circumstances here shown, when the case is fairly and fully submitted, as it was in the charge of the judge to the jury, giving a correct basis upon which there might be a recovery of damages, and there is testimony tending to show damages in at least the sum awarded by the Commission, there is no prejudicial error because of the erroneous calculation of the Commission which was the basis of its award. (P. 91. Italics ours.)

In the recent case of *U. S.* v. *New River Co.,* 265 U. S. 533, this court pointed out the broad powers of the Commission since the Transportation Act, 1920, and upheld its order providing that "joint mines" as well as "local mines" could not order cars in excess of the ratings of such mines based upon their capacity to ship coal, although it was

contended [7] that this denied to each joint mine its "legal right to its fair share of the car supply of each carrier serving the mine." The court in an opinion by Mr. Justice Butler said at pages 541 and 542:

> The Interstate Commerce Act confers power on the Commission to regulate the distribution of cars. See section 1 (3), (4), (6), (10), (11), (12), (14); section 3 (1); section 15 (1). And its jurisdiction over the subject is exclusive. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, (215 U. S. 452) *supra*, 472; *Baltimore & Ohio R. R. Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, 493; *Morrisdale Coal Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 304, 313; *Pennsylvania R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 131, 133; *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, 468; *Pennsylvania R. R. Co.* v. *Stineman Coal Co.*, 242 U. S. 298, 300. The courts will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its findings and conclusions.

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[7] As illustrating the contention, assume that a joint mine with a daily rating of 50 cars is served by carriers A and B. The contention is that the mine can order 50 cars of carrier A, and if the prorata share on that road is 50 per cent, the mine is entitled to receive 25 cars from that carrier, and may then as a legal right offer the remainder of its output—i. e., 25 cars—to the other carrier and receive its prorata share of that carrier's car supply. Thus the total orders from A and B would aggregate 75 cars, while the total orders permitted by the rule would be 50 cars, the mine's rating.

Certainly there is nothing in the Transportation Act, 1920, "which indicates a purpose on the part of Congress either to allow a carrier to create undue prejudice by the use of facilities possessed, or to narrow the Commission's powers to prevent unjust discrimination." *U. S.* v. *Pennsylvania R. R. Co.*, 266 U. S. 191. Instead that act, in many new provisions concerning car service and car distribution, clearly evidences the Congressional intent that the Commission should have even broader discretion in respect to car distribution rules than it had previously; that it should be better able to deal with this problem not only from the standpoint of preventing discrimination under section 3, but from the standpoint of prescribing reasonable rules and practices under section 1; and that there should be eliminated "any possibility of the recurrence of the evil of what is known as 'assigned cars'." (House Report No. 456, p. 27, 66th Cong., 1st Sess.)

The decisions referred to above clearly show that the Commission had ample authority to do what it did in the present cases. We shall, however, deal more in detail with the contentions as to its lack of authority in respect to (1) private cars and (2) railway fuel cars.

**c. The Commission in prescribing a rule of car distribution had power to treat private cars on the same basis as system cars, even if it had not found that placement of private cars at mines under the assigned car rule deprives other mines of labor and facilities to move system cars**

As we shall point out under another heading, the Commission's findings and the evidence before it

show that if mines are permitted under the assigned car rule to receive private cars in excess of their pro rata shares they will obtain more than their fair share of, and will take away from mines using system cars, services of railroad employees and facilities other than cars.

Here, however, we shall deal with the contention of appellees, and the holding of the court below, that in the absence of such a showing, private car owners have the right as a matter of law to the full and exclusive use of their cars and the Commission is therefore precluded from prohibiting placement of such cars at mines in excess of the pro rata shares of such mines.

The argument in substance is that difference in ownership of cars is a legal justification for difference in treatment in distributing cars to system car mines on the one hand and to private car mines on the other, and that, therefore, shippers using private cars have rights which are superior to those of shippers using system cars and which can not be interfered with by a requirement of pro rata distribution, even though the fundamental purpose of the act is to require fair treatment of shippers in respect to car service, "to compel the carrier as a public agent to give equal terms to all," "to cut up by the roots every form of discrimination, favoritism, and inequality," and to " place all shippers upon equal terms." *New Haven R. R.* v. *I. C. C.*, 200 U. S. 361; *Louisville & Nashville R R.* v.

*Mottley,* 219 U. S. 467; *U. S.* v. *Union Stock Yards,* 226 U. S. 286; and *Assigned Cars for Bituminous Coal Mines,* 93 I. C. C. 701, 718.

Private cars have no such standing under the act. They are "paid for by the carriers through allowances to the owners" (93 I. C. C. 729), and are "to all intents and purposes their [the carriers'] property" (*Chicago Refrigerator Co.* v. *I. C. C.,* 265 U. S. 292). "The control of the Commission over private cars, etc., is to be effected by its control over the railroads that are subject to the act. * * * It does not matter to the responsibility of the roads whether they own or simply control the facilities, or whether they pay a greater or less price to their lessor." (*Ellis* v. *I. C. C.,* 237 U. S. 434, 444.)

In other words when a railroad accepts a private car it makes that car a part of its own facilities and subjects itself to the exercise of the Commission's administrative powers in respect to the car as fully as in respect to other cars which it owns. This, the Commission points out, has been a "fundamental principle [governing it] in dealing with private cars." (93 I. C. C. 729.) By the very terms of the act, its jurisdiction over cars is "irrespective of ownership or of any contract, express or implied, for the use thereof." (Section 1 (3).)

While the Commission has not condemned contracts for the exclusive use of private cars by their owners and has left such cars subject to their direc-

tion, such a contract should not, and can not, frustrate the power of the Commission to require the same treatment in car distribution as between shippers that it has when all cars are carrier owned. No one, we believe, would seriously contend for a moment that if a railroad should enter into a contract with a shipper to set aside for the latter's exclusive use a large number of system cars and in placing these cars at the shipper's mine should give it relatively more cars than other mines, the Commission would be without jurisdiction to require pro rata distribution and thus to remedy the evils arising from such a practice.

In this connection see *C. & O. Ry. Co.* v. *Westinghouse Co.*, 270 U. S. 260, where action was brought by the railroad to recover amounts alleged to be due for the use of an engine and crew rented or assigned by it to the shipper and where it was said, among other things:

> It is no answer that by virtue of the contract the shipper secured the assurance of due performance of a transportation service which otherwise might not have been promptly rendered * * * to so assure performance to a shipper was an undue preference. Hence the contract would be equally void for illegality on this ground. *Davis* v. *Cornwell*, 264 U. S. 560.

In the *Cornwell case* a contract to furnish cars on a day certain was held to impose a greater obliga-

tion than that implied in the tariff and was held to be void. See also *Sou. Pac. Terminal Co.* v. *I. C. C.*, 219 U. S. 498. In the *Jacoby case*, 19 I. C. C. 392, the Commission declared that a practice by which the carrier gave to the Berwind-White Coal Mining Company a special allotment of 500 railroad cars daily in order that it might keep its contract with certain steamships "was inequitable in principle * * * and must be condemned in strong terms as an undue preference of one company and district and an undue discrimination against coal operators in another district" (p. 395).

As previously pointed out the long established and well recognized rule as to system cars has been to distribute them on a pro rata basis, and the action of the Commission in prescribing such a rule to control the distribution of private cars is eminently fair and just.

What the mine operator wants is service. The physical car is of no use by itself. It must be moved. Therefore, a mine which receives a 100 per cent car supply in private cars as compared with a mine ordering the same number of cars and receiving a smaller supply obtains relatively more service. This difference should not, and the Commission holds that it can not, be justified as a matter of law on the ground of difference in ownership of cars. That is a difference which is of no legal significance.

**(1) The amendments to the original act show that Congress intended that the Commission should have power to treat private cars on the same basis as system cars**

Section 1, of the original act of 1887 defined "transportation" subject to the Commission's jurisdiction as including "all instrumentalities of shipment or carriage." (24 Stat. L. 379.) In one of the first cases before the Commission after this act was enacted Judge Cooley, then Chairman of the Commission, announced the principle that private cars are part of the carrier's facilities and if the carrier enters into any contract permitting a private-car owner to have the exclusive use of his cars such contract can not derogate from the rights of other shippers to be given the same treatment which they would be entitled to receive if the cars were not privately owned but belonged in fact to the carrier. See 1 I. C. C. 503, 547; 3 I. C. C. 577, 587, and 5[8] I. C. C. 415, 434.

[8] It will probably be contended that this court refused to recognize this principle since the order in 5 I. C. C. 415 was held to be invalid in *Penn Ref. Co.* v. *West N. Y. & P. R. R. Co.*, 208 U. S. 208. However, as we understand that decision, there is nothing which shows disapproval in any way of the principle. In setting aside the order this court made it plain that other shippers had not asked for and could not use the kind of cars which were privately owned, and therefore there was "no ground for finding discrimination in the charge for the weight of the barrel package (such charge being in itself not an unreasonable one), while none is made for the tank containing the oil. It might be different if plaintiffs desired tank cars and defendants failed to furnish them on demand" (p. 221).

In 1906 the definition of "transportation" was enlarged in order, among other things, to make certain that private cars should be subject to the provisions of the act. Thus "transportation" was defined as including "cars * * * irrespective of ownership or of any contract, express or implied, for the use thereof." At the same time section 15[9] was amended so as to authorize the Commission to fix the maximum allowance to shippers for the use of their cars. Congress in this way made it plain that private cars should have the same legal status under the act as other cars and that compensation for the use of private cars should be in the form of money and not in preferred service or other con-

[9] Section 15 (13) now reads: "(13) If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as a maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

siderations.[19] Further evidence of the Congressional intent that private cars should have no preferred standing under the act but should be fully subject to its provisions is the requirement in paragraph (12) of section 1 inserted by Transportation

[19] In House Report No. 591, 59th Cong. 1st Sess., Jan. 27, 1906, the amendment of section 1 is explained in part as follows: "The first section of the bill is substantially section 1 of the act of 1887, with an enlargement of the definition of the word 'railroad' and the word 'transportation.' By this enlargement it is believed that the 'devices' resorted to by carriers, through the use of switches and *cars owned by shippers*, and by the use of refrigerator cars, and so forth, can be obviated." Mr. Townsend, a member of the House Committee, said in support of the bill that it "attempts to place under the supervision of the Commission every form of interstate and foreign commerce, all instrumentalities of commerce and transportation. * * * To that end we have declared that cars, vehicles, and instrumentalities of shipment or carriage, irrespective of ownership or of any contract, express or implied, * * * shall be considered as being furnished by the carrier, and therefore under the supervision of the Interstate Commerce Commission." (Cong. Rec., Vol. 40, p. 1764, 1765.) As to "whether the terms of this bill, if carried out, will control private cars" he said: "I have no doubt about that at all. * * * I have always maintained that the power which gives the Commission control over interstate carriers gives it control over every agency of those carriers and over every car hauled by the carrier, whether owned by it or not; but this bill expressly names private cars." (Id. page 1765.) Mr. Gaines, another member of this committee, said: "We undertake, by a definition of the agencies of transportation, to prevent discrimination as far as possible to prevent rebates and *all forms of unlawful discrimination*. One of the most important features of the bill is that definition." (Id., part 3 p. 2174, part 10, p. 33. Italics ours.)

Act, 1920, that "every car" distributed to coal mines must be "counted". This paragraph will be dealt with more fully under another heading.

An excellent statement as to the status of private cars is quoted by the Commission in its first report, page 557, from reports of the committee on car distribution and car shortage, including Commissioner Lane, to the National Association of Railway Commissioners in the promulgation of the Uniform Demurrage Rules, in 1909:

> It is the carrier's duty to furnish all facilities of transportation, and it can not permit the presence of any equipment upon its line to work a discrimination as between shippers. * * *
>
> When a private car is employed by a carrier in lieu of its own equipment as an instrumentality of transportation it is thenceforth not a private car, but a railroad car; it does not regain its status as a private car until, after the transportation is concluded, it leaves the carrier's service. * * *
>
> The contract under which the car enters the carrier's service is a thing altogether apart from the carrier's undertaking to transport the owner's freight. In the one case the car owner by supplying the instrumentality of transportation assists the carrier to discharge its public function; in the other his status is that of an ordinary consignor or consignee. * * *
>
> A car owner can claim no advantage as a shipper that would not accrue to him if the

> car were owned by a different person having no interest in the freight. (p. 557–558).

The Commission pointed out on page 558 of its first report that

> The language quoted was cited by us in *Procter & Gamble Co.* v. *C., H. & D. Ry. Co.*, 19 I. C. C. 556, 559, where we held the private car liable to demurrage charges, even when on the tracks of the owner.

The Commission's decision in the *Procter and Gamble case* was sustained by the Commerce Court, 188 Fed. 221, and was held not to be reviewable in *Procter and Gamble* v. *U. S.*, 225 U. S. 282. In *Swift & Co.* v. *H. V. Ry. Co.*, 243 U. S. 281, the Procter and Gamble case was cited with approval and it was held that private cars on railroad tracks were subject to demurrage charges. To the same effect, see *National Refining Co.* v. *St. L. I. M. & S. Ry.* (C. C. A. 6th Cir.), 237 Fed. 347, 351.

In *United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208, involving the authority of the Commission, in the absence of discrimination, to require tank cars to be furnished,[11] this court, through Mr. Justice McKenna, pointed out that as early as *Scofield* v. *Lake Shore & Michigan Southern Ry. Co.*, 2 I. C. C. 90, the Commission——

> declared that it was properly the business of the carrier to supply the rolling stock for

[11] Since this decision the Commission in section 1 (21), added by Transportation Act, 1920, is authorized to require carriers to provide themselves with cars.

the freight he offers or proposes to carry, and that if the diversities of the traffic are such that this is "not always practicable, and consignors are allowed to supply it themselves, the carrier must not allow his own deficiencies in this particular to be made the means of putting at an unreasonable disadvantage those who make use in the same traffic of the facilities he supplies." To prevent such disadvantages or preferences the Commission decided it had power; to enforce the duty of supplying cars it decided it had not the power. (p. 220.)

On page 235 the language used in *Ellis* v. *I. C. C.* 237 U. S. 434, supra, was referred to as follows:

* * * And this was said: "It is true that the defination of transportation in section 1 of the act includes such instrumentalities as the Armour Car Lines lets to the railroads. But the definition is a preliminary to a requirement that the carriers shall furnish them upon reasonable request, not that the owners and builders shall be regarded as carriers, contrary to the truth." The language was perfectly apposite to the question under consideration, the relation of the Armour Car Lines to the Armour Company and to the railroad. *The cars the latter obtained from the Car Lines Company constituted the equipment of the railroad company and were, of course, subject to the provisions of the Interstate Commerce Act.* (Italics ours.)

In *Chicago Refrigerator Co.* v. *I. C. C.* 265 U. S. 292, it was held that a certain car company was not a carrier by railroad within the meaning of section 209 of the Transportation Act, which provided for a guaranty of income for six months after March 1, 1920. The court, in an opinion by Mr. Justice Sutherland, describes the car company in part as follows, pages 294–295:

> The Car Company did not own or control any railroad property or facilities, aside from these cars. The contracts provided for payment of compensation for the use of the cars by the railroad companies on the basis of mileage—that is, a fixed sum for each mile over which the cars were run. *The cars were under the control of the railroad companies, subject to the observance, on their part, of the directions of the Car Company as to the distribution of cars.* The Car Company solicited freight from shippers, for which it was generally paid commissions; and exercised a degree of supervision over the shipment.
>
> * * * * *
>
> The court below accurately summarized the testimony as showing, "that the Refrigerator Company is not incorporated as a carrier, does not control or use the necessary facilities for performing carriage, does not hold itself out to perform carriage by publishing rates applicable thereto, and does not in fact perform carriage or receive any compensation from shippers whose shipments

> move in its cars. *The cars are rented to railroad companies. They are subject to the control of the latter and are to all intents and purposes their property during the period of the lease.* In a word, the Refrigerator Company carries nothing." (Italics ours.)

After quoting with approval the language set forth above in the *Ellis case,* 237 U. S. 434, the court held that the income of the car company was not railway operating income and said, page 296, 297:

> The income arises not from operating a railway but from the use of facilities let to the railway companies for fixed compensation. *Stress is laid on the assertion that there is no specific language in the contracts except in one instance, to the effect that the cars are leased. It is not necessary that there should be.* In pursuance of the contracts the cars were delivered to, operated and controlled and their use as instrumentalities of transportation paid for by, the railroads. This is enough to establish a letting for hire; and there is nothing in the contracts or in any of the details of their performance which requires a different conclusion. (Italics ours.)

The Commission in its supplemental report, page 728, referred to *United States* v. *B. & O. R. R. Co.,* 165 Fed. 113, reversed, as above pointed out, on jurisdictional grounds in the *Pitcairn case,* 215 U. S. 481, as follows:

In that case the Circuit Court of Appeals for the Fourth Circuit in dealing with the distribution of privately owned cars to coal mines called attention to the provisions of section 1 requiring carriers to furnish transportation upon reasonable request and to the definition of "transportation" in section 1 as including cars and other vehicles "irrespective of ownership or of any contract express or implied for the use thereof," and then proceeded as follows, pages 122 and 123:

"In passing upon the questions involved, it should be borne in mind that the statute casts upon the carrier the plain duty of furnishing a fair and equal distribution of facilities to the shipper. The duty thus enjoined can not be evaded by the carrier by claiming that it is not the owner of the portion of the cars carried over its lines. The duty of furnishing equal facilities relates to and involves purely the question of transportation, and when we are called upon to determine as to whether in any particular instance there has been an undue and unreasonable discrimination or preference as contemplated by the statute, the sole question is as to whether the entire equipment operated over the lines of the carrier has been fairly and equally distributed among all the shippers along its lines who are similarly situated. The defendant mine owners insist that in the purchase of individual cars they have expended a considerable sum of money, which thereby becomes a part of their invest-

ment and should be treated as such, and that it would be unfair to them to require the carrier to charge such cars as a part of the percentage to which they are entitled. This is a matter which we can not consider, inasmuch as the statute was not enacted for the purpose of promoting the interest of any particular mine owner; it being limited to one purpose, to wit, the fair and equal distribution of car service by railroads or transportation companies among all mine owners similarly situated within the territory in which their lines are operated.

"It is made the duty of the carrier to move the product of the shipper, and in doing so, if the carrier should by any means deny to a particular shipper his just and proportionate share of facilities as compared with other shippers similarly situated, then, in that event, the shipper would undoubtedly be entitled to the relief accorded by section 23 of the act. If, as in this instance, a carrier, by contractual arrangement, operates individual cars belonging to mine owners as a part of its equipment, such arrangement can not in the slightest degree relieve the carrier of the duty to furnish equal facilities to all shippers similarly situated. To adopt any other rule would be to make it possible for wealthy mine owners, by the purchase of car equipment, to utilize the means of transportation operated by the carrier to such an extent as to practically deprive other mine owners similarly situated of any means of

> transportation, and it was to avoid this very kind of discrimination that the provisions of sections 1 and 3 of the interstate commerce act were enacted. There is nothing in the interstate commerce act which prohibits a carrier from making any arrangement it may choose as respects the ownership of cars which it operates on its lines. That is a matter which is left entirely with the carrier; but, while such is the case, it is equally true that the carrier can not, by any such arrangement, by indirection, accomplish that which is prohibited by the statute."

See also *Logan Coal Co.* v. *Pennsylvania R. Co.*, 154 Fed. 497, 503, supra.

**(2) In prescribing the pro rata rule in its order the Commission has carried out the principles laid down in the Traer case and approved by this court**

As previously pointed out, the decision of the lower court in *Chicago & Alton R. Co.* v. *I. C. C.*, 173 Fed. 930, sustaining the Commission's order in the *Traer case,* 13 I. C. C. 451, supra, as to private cars and foreign railway fuel cars was not disturbed by this court in the *Illinois Central case,* 215 U. S. 452, although it was claimed that the order in " directing the taking into account of private cars in the distribution of cars, was unjust, unreasonable, oppressive, and unlawful, because it deprived the owners of such cars of the right to the use of their property." That it did actually limit their so-called "rights" is made clear by Mr. Gutheim, one

of the principal railroad witnesses, who testified that "for a number of years after the decisions in the *Traer* and *Hocking Valley cases,* which limited to a considerable extent the rights theretofore enjoyed by private car owners, there was a tendency of the private car owners to rid themselves of private cars." (R. 806.)

The lower court in sustaining the order in the *Traer case* made the following excellent statement of the very principles which are applicable in the present cases:

> A charter duty of railroads is to provide cars, as well as tracks and locomotives. So far as the shipping public is concerned, it is a matter of indifference whether railroads discharge this duty by purchasing or by renting or by borrowing cars. But since no vehicle for transporting commodities in commerce can have any rights upon the tracks of a public carrier except under and by virtue of the carrier's charter, a shipper who is not also a lessor or lender of cars is interested in seeing that the carrier abstains from discriminations in conditions of service on account of the ultimate ownership of any of the instrumentalities used by it in the transportation of commodities in commerce. A shipper who owns cars is not entitled on that account, or on any account, to a preference in rates or in promptness of service. If his cars are used, all that he is entitled to is to be paid the just value of the use, whether measured by mileage or otherwise. If he

> has a contract with the carrier that calls for more, that contract is pro tanto void. In our judgment, therefore, the so-called private cars, if accepted by an interstate carrier for use by it in transporting a commodity in commerce, must be treated as constituting a part of the carrier's available commercial equipment (p. 932).

See to the same effect *Majestic Coal & Coke Co.* v. *I. C. R. Co.*, (C. C. N. D. Ill.) 162 Fed. 810, 811.

As previously pointed out the Commission in the *Traer case* was dealing with the practice where both assigned cars and system cars were placed at the same mines and the effect of the assigned car rule was precisely the same as the pro rata rule here under consideration wherever the assigned cars were not sufficient to exceed the pro rata. Appellees do not question the authority of the Commission to make the rule in that case, yet the logic of their argument in the present case if applied to that rule would mean that the Commission would be without power to prevent a mine from receiving its pro rata share of all system cars and then enjoying the full use of its private cars by having them placed in addition to the system cars, if there were no definite finding, and according to their theory there was none, that such placement would deprive unassigned car mines of motive power, labor, and railroad facilities which otherwise would move system cars. Their argument ignores the fact so clearly established by this court, that private cars have no preferred legal status under the act.

The provisions of the act and the decisions of this court unmistakably show that the Commission had full authority to treat private cars on the same basis as system cars, irrespective of a showing, and there was a showing, that placement of private cars at mines in excess of their pro rata shares deprives other mines of labor and facilities to move system cars.

**d. That cars may be used for railway fuel does not exempt them from the provisions of section 1 requiring reasonable and just rules of car distribution, or section 3 prohibiting unduly preferential or prejudicial rules**

While as we understand the lower court's decision, it concedes that "company fuel cars are instrumentalities of commerce and subjects of control in administering the act (*Interstate Commerce Commission* v. *Illinois Central Railroad,* supra)" (Akron R. 72), the carriers will no doubt contend in this court that the Commission had no authority to make its order controlling the distribution of railway fuel cars. In view of this it seems appropriate to refer again to the *Illinois Central case,* 215 U. S. 452. There this court definitely sustained the authority of the Commission to prescribe the rule of the *Traer case,* 13 I. C. C. 451, under which railway fuel cars were treated on the same basis as system cars when the number placed at any mine was not sufficient to equal that mine's pro rata share of all cars distributed.

In the lower court in that case it was contended in substance, and the court held, that cars used by a carrier in obtaining fuel coal on its line—

> are withdrawn from complainants' available commercial equipment, just as are flat cars while being used to distribute gravel for ballast. It is erroneous, therefore, to require complainants, in distributing their available commercial equipment among their shipping patrons, to take account of cars that are being used in hauling their own fuel (C. & A. v. I. C. C., 173 Fed. 930, 933).

In overruling this contention and sustaining the Commission's order this court said, among other things, pages 472, 474:

> When coal is received from the tipple of a coal mine into coal cars by a railway company, and the coal is intended for its own use and is transported by it, it is said there is no consignor, no consignee and no freight to be paid, and therefore, although there may be transportation, there is no shipment, and hence no commerce.
>
> * * * * *
>
> It may not be doubted that the equipment of a railroad company engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce. From this it necessarily follows that such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equal distribution and the prevention of an unjust and discriminatory one.

See also the *Morrisdale case,* 230 U. S. 304, 314, and the other cases cited supra.

The Commission in its second report, pages 714 to 718, deals carefully with the contention of carriers as to its authority over railway fuel cars. The situation as to mines, including those owned by railroads, which furnish their output under long-term contracts for railway fuel, is considered on pages 716, 717, and 725, and its authority to deal with such mines, not only under section 1, but also under section 3, is made clear.

The Commission in holding to be without merit the contention that the words "served" and "transportation" in section 1 (12) show that it had no jurisdiction, said, among other things:

> Respondents, however, contend that paragraph (12) of section 1 shows that we have no jurisdiction over the distribution of cars to carrier-owned or output-contract mines which furnish railway fuel exclusively for at least six months, because such mines are not "served" by a carrier and coal is not "transported" therefrom. The first sentence of this paragraph is relied upon to support this contention. This sentence reads:
>
> "It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for *transportation* of coal among the coal mines *served* by it, whether located upon its line or lines or customarily dependent upon it for car supply."

The word "served" has no judicially determined or technical meaning which would make it inapplicable to carrier-owned or output-contract mines. We must, therefore, give this word its ordinary meaning. The Standard Dictionary defines it, among other things, to mean "to furnish or provide as with a regular supply at stated periods." "Self-service" is a common expression. To use this word, therefore, to mean the furnishing of cars by a carrier at its own mines or at those the output of which it takes, is to give the word its ordinary and well-accepted meaning. This is the meaning which we believe the Congress intended. As used in paragraph (12) "served" is a convenient term to show that the provisions of this paragraph apply not only to mines which are located on a carrier's own line, regardless of the ownership or contractual arrangements of such mines, but also to mines which are located off its line and which it customarily supplies with cars.

Respondents also contend that the word "transportation" in paragraph (12) means common-carrier transportation, transportation for compensation, and not transportation of a carrier's own coal over its own line for its own consumption. They cite as authority *Int. Com. Comm.* v. *Balt. & Ohio R. R.*, 225 U. S. 326; *Santa Fe Ry.* v. *Grant Bros.*, 228 U. S. 177; and *The Pipe Line Cases*, 234 U. S. 548.

That "transportation" has not the restricted meaning claimed appears from the

use of this word in the second sentence of paragraph (12), which reads:

"* * * During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for *transportation* of coal against the mine * * *."

The counting requirements clearly apply to cars placed by a carrier for its coal at mines on the same date shipping commercial coal, yet this coal is transported by the carrier without compensation. The word "transportation," therefore, as used in paragraph (12) is not limited in its meaning to transportation for compensation, but includes also transportation of the carrier's own coal over its line (p. 714).

Concerning foreign railway fuel cars the principle is well settled, as pointed out by the Commission in its second report, page 716:

When a railroad company becomes a purchaser of coal upon the lines of a connection, and ships it to itself as consignee, it is entitled to the same consideration as any commercial shipper or consignee and no more, and this is true when the shipment moves partly over the rails of the carrier that is in fact the shipper or consignee. *Rates on Railroad Fuel and Other Coal,* 36 I. C. C.

1, 9, *Divisions of Joint Rates on Railway Fuel Coal,* 37 I. C. C. 265.

See also *Interstate Commerce Commission* v. *B. & O. R. R. Co.*, 225 U. S. 326.

Concerning special types of equipment the lower court said: "Many of the plaintiffs have equipped themselves with coal cars of special design not available for commercial use." (Akron R. 50) This is directly contrary to the finding by the Commission. The Hocking Valley was the only one of the plaintiffs making any such contention before the Commission, and it was found (93 I. C. C. 725) that the "side-dump" cars as to which the contention was made "were in commercial service for many years before they were put in fuel-coal service"; that "they are placed at partial-output mines selling commercial coal and are distributed on a pro rata basis"; and that they "constitute part of the available equipment of" this carrier "for commercial shipments, and come within the class of equipment as to which Congress requires 'a just and equal distribution and the prevention of an unjust and discriminatory one.' *Illinois Central case,* 215 U. S. 452, 474." As to the contention that without the assigned car rule "carriers will be deprived of the advantage of using a particular type of cars especially adapted for unloading at coaling stations", the Commission said (Id. p. 725):

> Our order, however, does not prohibit such use, but merely placement in excess of the mines distributive share. The Hocking

Valley, as we have just pointed out, now uses its side-dump cars in securing coal from partial-output mines on a pro rata basis of distribution.

**e. The Commission's order preserves the rights of unassigned car mines to reasonable and non-preferential car supply and does not regulate the coal-mining industry**

The lower court holds that the Commission's order "undertakes by indirection to regulate the soft coal industry in matters which do not constitute transportation service relating to commerce and are not within the regulatory power of the Commission." (R. 74.) The theory apparently is that the order will unlawfully require railroads and private car owners to modify or change their contracts and to alter their methods of obtaining coal.

Exactly the same contention was made in the *Illinois Central case,* 215 U. S. 452, where as previously pointed out this court sustained the assigned car rule prescribed in the *Traer case.* Under the practice which prevailed before the rule was established a mine selling commercial coal and railway fuel coal could obtain its pro rata share of system cars to move its commercial coal and in addition railway fuel cars to move the fuel coal and the result was that such a mine would receive practically a full car supply. Under the assigned car rule, however, the railway fuel cars would be counted. The result was that the mine which retained its commercial business would force the rail-

road to secure its fuel coal elsewhere. This is illustrated by the examples shown on page 19 of this brief under our statement of the case.

The contention was so clearly overruled by this court in the *Illinois Central case* that it is difficult to understand how the lower court could have held as it did. There, in the opinion by Mr. Justice White, it was said, page 477:

> * * * it is insisted, when the findings made by the commission are taken into view and the pleadings as an entirety are considered, it results that the discriminations and preferences arose from the fact that the railroad company chose to purchase its coal for its fuel supply from a particular mine or mines, and that, as it had a right to do so, it is impossible, without destroying freedom of contract, to predicate illegal preferences or wrongful discriminations from the fact of purchase. But the proposition overlooks the fact that that regulation addresses itself, not to the right to purchase, but to the duty to make equal distribution of cars. The right to buy is one thing and the power to use the equipment of the road for the purpose of moving the articles purchased in such a way as to discriminate or give preference are wholly distinct and different things. * * *

The Commission, by its order in this case, has not in any manner attempted to invade the internal and private business affairs of the carriers or private-car owners. Neither is required to forego the use of cars for securing railway fuel or coal for other

purposes. The only requirement is that such cars if distributed should not in any manner give any mine more than its pro rata share.

The lower court apparently overlooked the fact that the findings of the Commission as to the methods the carrier or private-car owner might pursue in obtaining its coal without the assigned-car rule do not purport to prescribe in any way the carrier's business methods, but are intended to show, and do show, that there is no necessity justifying the injurious and inequitable practices under that rule.

Appellees no doubt will rely here, as they did in the lower court, upon language of this court in *Interstate Commerce Commission* v. *Chicago Great Western Railway,* 209 U. S. 108, 119, to show that the Commission can not invade the private affairs of carriers.

That case, which was not a car-distribution case, was also relied upon by the railroad in the *Illinois Central case*, 215 U. S. 452, 459, supra (See railroad's brief, page 23), where as previously observed the contention that the Commission's order was a regulation of the carriers' private business was definitely overruled. The case does not support appellees. Even though it was decided before the new and comprehensive provisions of 1920, it shows that "from the public character of the work in which they [railroads] are engaged the public has the power to prescribe rules and secure faith-

ful and efficient service and equality between shippers and communities."

It will also probably be contended here, as it was in the court below, that the Commission had no right to consider the effect of the assigned car rule on mine labor. This, however, overlooks the fact that the Commission was not dealing with the general problem of mine labor but with the disastrous effects resulting directly from unfair and prejudicial distribution of cars to unassigned car mines. In the *Illinois Central case*, 215 U. S. 452, *supra*, one of the grounds which the Commission relied upon to sustain the order and which the court also relied upon (p. 475) was:

> (*d*) That the operator receiving the foreign railway fuel cars, private cars, or company fuel cars is enabled thereby to secure and hold a larger, more efficient, and regular working force of miners and laborers. (p. 467)

In *Bulah Coal Co.* v. *Penn. R. R. Co.*, 20 I. C. C. 52, the Commission adopted the rule of the *Traer Case* and said, among other things (p. 54):

> One of the evils lying at the root of the trouble is that the mine that has a larger and more constant supply of cars may not only be operated at less cost, but, what is equally if not more important, such a mine is able to attract miners from the other mines because of the assurance it gives of a more constant opportunity to earn a daily wage.

Judgment for damages based upon the rule thus prescribed in the *Bulah Case* was sustained by this Court in *Penn. R R. Co.* v. *Minds,* 250 U. S. 368.

**f. The Commission's order prevents a serious infraction of the rights of shippers of coal in system cars to reasonable and non-preferential treatment under the act. It does not require the taking of property or the abrogation of contractual rights of appellees in violation of the Constitution or of any law**

Much is said by the lower court and by appellees as to their rights. But the courts will not recognize rights at common law or by statute which are "inconsistent with the administrative powers conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates" and reasonable and non-preferential car distribution "is observed." *T. & P. Ry.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 441. See *New River Case,* 265 U. S. 533, 541, and *Illinois Central Case,* 215 U. S. 452, 466. Section 22 relating to common law rights was added "not to nullify other parts of the Act or to defeat rights or remedies given by preceding sections." *P. R. R.* v. *Puritan Coal Co.,* 237 U. S. 121, 129.

The rights here asserted by appellees have no standing in law, because they are inconsistent with the duty of the Commission under the Act to bring about reasonable and non-preferential car service and to prevent shippers not using assigned cars

from being unjustly and unlawfully deprived of their property.

As previously pointed out, the Commission makes it plain in its report that carriers and private car owners are left free to purchase coal where and from whom they desire and that they may use their own cars in securing this coal. However, just as a commercial shipper has no right to insist that a mine be supplied with 100 per cent of system cars during a period of car shortage because he has a contract for the output of the mine, so neither private car owners nor railroads have such a right.

If a private car owner, for example, elects to place his private cars in railroad service and thus under the provisions of the interstate commerce act, the mere fact that his cars will not be moved, when to do so would give the private car mine more than its fair share of cars, does not deprive him of any legal right. It is one of the risks which he assumes when he makes a contract for exclusive use of his cars. He can, of course, at any time, instead of assigning his cars to one mine and getting 100 per cent car supply, the practice under the assigned car rule, send his cars to two or more mines so as not to exceed the pro rata allotment of such mines under the pro rata rule, and thus keep his cars in service.

The evidence shows that, generally speaking, appellees do not use their private cars at all of the mines from which they secure their coal but at

only certain of such mines. (R. 1281, 1348, 1599, 1358, 1337, 1361.) Thus even under existing arrangements, they could easily make a wider distribution of their cars and secure their full use without bringing about the discrimination the Commission has condemned. The same thing is true as to the railroads. The Hocking Valley, for example, distributes its side dump fuel cars at partial output fuel mines in such manner as not to exceed the pro rata allotment of such mines. (93 I. C. C. 701, 710.)

In passing it should be observed that the contentions of appellees as to holding cars idle would, if applied to the *Traer Case,* invalidate the order in that case, although admittedly that order was within the Commission's authority.[12]

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[12] The following example will illustrate this: Assume that mines A and B are the only two on a railroad, each with a rating of 100 cars and each ordering its rating; that there are 40 private cars to be used in filling a contract at mine A and there are 100 system cars available for distribution. Assume further that mine A has sold 50 per cent of its output, namely, 50 cars a day, to a particular industry not using private cars under an agreement that this tonnage will be shipped first and that the balance of the output is to be shipped under the contract with the private car owner. Under the *Traer* rule mine A would not be allowed to receive its pro rata share of system cars, namely, 50, to fill its prior contract, and the 40 private cars in addition. The private cars would thus have to be held idle, or the owner would have to send them to some other mine for coal or put them to some other use.

What has just been said, however, is irrespective of the Commission's findings that placement of assigned cars under the assigned car rule at designated mines deprives other mines of the services of railroad employees and of facilities other than cars which could be used to move system cars. If, under these circumstances, private cars are held idle in order that such services and equipment may be devoted to giving all mines a pro rata car supply, no one, we believe, could seriously challenge the justness and lawfulness of the Commission's action in bringing about such a result.

In dealing with the constitutional question raised by private car owners, the Commission in its second report said at page 737:

> Some of the private-car owners contend that they have invested many millions of dollars in reliance upon the rule laid down in the *Hocking Valley case* and *Traer case*, and that if we should now prohibit placement of such cars in excess of the pro rata allotment of the mines to which they are assigned or consigned we would take away the only advantage of such cars and in practical effect wipe out the investment which has been made.
>
> In our original report we did not find that the use of private coal cars should be prohibited or that they should not be placed at the mine to which they were consigned. What we did prohibit was the placement of such cars at a mine in excess of the pro rata

> share of available cars. Private-car owners were left free to continue to use their cars and to have them so distributed to designated mines as not to exceed the pro rata share of such mines. That large sums may have been invested in reliance upon a rule which is unreasonable and unjustly discriminatory or may become or be found so under the interstate commerce act does not mean that we are powerless to change the rule and prescribe a just and nonpreferential one. (*Douglas* v. *C., R. I. & P. Ry. Co.*, 21 I. C. C. 97, 101; *So. Pac. Co.* v. *I. C. C.*, 219 U. S. 433; and *Louisville & Nashville Ry. Co.* v. *Mottley*, 219 U. S. 467.)

In the *Mottley case*, referred to in this quotation, the court in holding invalid a contract granting free transportation as compensation for personal injuries, because in conflict with the antipass provisions of the act to regulate commerce, which were later enacted, said at page 482:

> The agreement between the railroad company and the Mottleys must necessarily be regarded as having been made subject to the possibility that at some future time Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or to impair its value. That the exercise of such power may be hampered or restricted to any extent by contracts previously made between individuals or corporations, is inconceivable.

> The framers of the Constitution never intended any such state of things to exist.

See *Mich. Cent. R. R.* v. *Mich. P. R. Comm.*, 236 U. S. 615, in which the court in sustaining an order of a state commission, which required the railroad to deliver cars to a connection said, at page 631:

> At common law a carrier was not bound to carry except on its own line, and probably not required to permit its equipment to be hauled off the line by other carriers. (Cases cited.) But in this, as in other respects, the common law is subject to change by legislation; and, so long as the reasonable bounds of regulation in the public interest are not thereby transcended, the carrier's property can not be deemed to be "taken" in the constitutional sense. (Cases cited.)

That the Commission did not assure the Public Service Electric Co., as apparently contended by its successor, the Public Service Electric and Gas Co. (R. 285), that its cars could be used under the assigned-car rule without interference by the Commission is shown by the testimony of Mr. Farrand, Vice President of the former (R. 1091–1093, 1261, 1585–1587).

The findings of the Commission referred to in our statement of the case and the decisions above cited clearly show that its order was a reasonable exercise of its powers to require just and non-preferential rules of car distribution and was

clearly not within the constitutional inhibition against arbitrary action.[18]

**(g) Section 1 (12) does not prohibit the commission from changing the assigned-car rule but merely requires all cars to be "counted" and vests discretion in the Commission to determine how they shall be distributed**

It is difficult to see how the words of paragraph (12) of section 1 could, under any theory, be twisted into meaning that cars must be counted only as provided in the assigned-car rule and that the Commission, therefore, is without authority to require a different rule by its order of pro rata distribution here under attack. Such a contention, however, was made by appellees in the lower court and seems to have impressed that court, although it held that it was unnecessary to decide the question.

Paragraph (12) reads, so far as material here, as follows:

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[18] A note in the April, 1924, number of the Harvard Law Review, Volume 37, page 753, refers to the Commission's original decision in the *Assigned Car Case* and points out that as the result of it "Equality at last is attained"; that "a private car is to be considered as a general instrumentality of transportation until it is returned to its owner, and entitles him to no advantages over other shippers"; that "a drastic restriction on the beneficial use of the private car could hardly be taking property without due process of law"; that "the Commission is protected from the accusation of arbitrary action by the fact that its purpose was to prevent discrimination," and that "It would seem * * * that any relief for the proponents of the assigned car must come through a change in attitude of the Commission, or failing that, through an Act of Congress."

> (12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. * * *

Section 1 (14) and section 15 (1) authorize the Commission to prescribe reasonable and nonpreferential car-distribution rules.

The Commission has construed paragraph (12) not as requiring pro rata distribution of cars or distribution under the assigned-car rule, but as requiring merely that all cars must be "counted" and as leaving to the Commission administrative discretion to determine how they shall be distributed. *Assigned Car case,* 80 I. C. C. 520, 535. This gives the word counted its ordinary meaning (see Webster's Dictionary) and the very meaning which this court gave it in the *Morrisdale case,* 230 U. S. 304, 312, supra, where it was said:

> In some cases it was held that private cars and fuel cars of foreign railroads consigned to particular mines should be *counted* in making the distribution. Others held that

> such cars should be *counted,* but that if the foreign cars, or those owned by the private corporations, exceeded their percentage, the excess might be retained by those coal companies. (Italics ours.)

The first sentence of paragraph (12) in section 1 and the other provisions of that section relating to car service unmistakably show the intention of Congress to vest in the Commission more fully than ever before administrative powers to deal with the difficult and complicated problems of car distribution. To give the counting provisions of paragraph (12) the meaning contended for by appellees would defeat this purpose and would strip the Commission of authority to remove the unjustly discriminatory and unreasonable practices which it has so clealy pointed out in its report as existing under the assigned car rule. The Commission would even be powerless, save under its emergency powers, to prevent 100 per cent service of private car mines during periods of aggravated shortage in locomotives and terminals. Certainly if Congress had intended any such results it would have said so in unmistakable language. Moreover, carriers which had voluntarily applied the pro rata rule (R. 1615) or otherwise restricted the effect of the assigned car rule would be guilty of violating the law (R. 784).

The statute provides that *every* car must be counted. There is not a word of explanation as to how the distribution shall be made when the car is

counted. To say that the statute means that private cars and railway fuel cars shall, as a matter of law, be placed in unlimited quantities at particular mines, regardless of the unfair treatment and prejudice suffered by mines receiving a smaller supply of system cars, is to write into the statute something which clearly is not there and to bring about such unreasonable results as to make the construction an impossible one. No such limitation is expressed in the statute, and "to engraft it would" in the language of this court " be an act of pure judicial legislation." *U. S.* v. *D. & H. Co.,* 213 U. S. 366, 405. " To supply omissions transcends the judicial function." *Iselin* v. *U. S.,* 270 U. S. 245, 251.

Appellees seek support for their theory in the fact that the Senate Bill (S. 3288) dealing with the subject expressly prohibited placement of cars in excess of the pro rata shares of the mines served and that these provisions were rejected, thus showing, they contend, that Congress intended to prescribe the assigned car rule. But instead of showing this, it shows that Congress intended that the Commission's broad discretion over car distribution matters should not be interfered with and that it should clearly have jurisdiction over "every car" placed at coal mines, in determining and prescribing "reasonable distribution of cars."

Again it is contended that the Commission itself in Assignment of Freight Cars, 57 I. C. C. 760, 766

(June 11, 1920), an ex parte proceeding in which it explained to the Senate its emergency order of April 15, 1920, authorizing the assigned-car rule, has said that paragraph (12) of section 1 "states in statutory form that which had theretofore been the law pursuant to the decisions of the Commission and of the Supreme Court." But the law was that the Commission had discretion to determine the manner in which cars should be distributed. There was no law prohibiting departure from the assigned-car rule. The Commission certainly never intended to hold that it was powerless to modify that rule.

When the Transportation Act, which inserted paragraph (12) of section 1 in the interstate commerce act, became effective on February 28, 1920, the carriers' rules did not provide for the placement of cars for railway fuel under the assigned-car rule. There was much discussion then as to how the carriers could obtain their fuel. Did the carriers or shippers or the Commission point to the statute and say that it required distribution as a matter of law under the assigned-car rule? They did not. In fact the Commission on March 2, 1920, recommended the continuation of the existing rules. (80 I. C. C., 520 at page 528.)

Appellees further contend that they are supported in their theory by the following from the report to the House of Representatives concerning

section 1, paragraph (12), and this is quoted in the opinion of the lower court:

> Paragraph (12) of the amended section incorporates in the statute a rule laid down by the Commission and upheld by the Supreme Court as to just and reasonable distribution of coal cars among the mines, thus avoiding any possibility of the recurrence of the evil of what is known as "assigned cars."

This, however, shows clearly that the fundamental purpose of Congress as to avoid "any possibility of the recurrence of the evil of what is known as 'assigned cars'," a purpose that would be utterly thwarted by the construction contended for by appellees. In referring to the rule laid down by the Commission and sustained by this court, Congress no doubt had in mind the effect of that rule in bringing about substantially pro rata distribution under the circumstances existing when it was prescribed and also the principle that private cars and railway fuel cars should not be exempt from regulation but should be counted and taken into consideration as any other cars.

The Commission in its second report, 93 I. C. C. 701, at page 730, referred to the contention here under consideration as follows:

> The contention is made that paragraph (12) of section 1, which was incorporated into the interstate commerce act by transportation act, 1920, limits our power to change or extend by further limitation the rule laid

down in the *Traer case* and *Hocking Valley case.* That this was not the intent of Congress, we think, is clear. In this connection, it is to be observed that the Supreme Court in *United States* v. *Pennsylvania R. R. Co.,* decided November 17, 1924 (266 U. S. 191), used the following language:

* * * "There is nothing in the act to Regulate Commerce as originally enacted, or in Transportation Act, 1920, or in any earlier amendment, which indicates a purpose on the part of Congress either to allow a carrier to create undue prejudice by the use of facilities possessed, or to narrow the Commission's powers to prevent unjust discrimination." * * *

Private cars which are paid for by carriers for use and are used on their lines are clearly "facilities possessed," and come within the broad powers conferred upon us by the statute to prevent unjust discrimination.

The Commission's view is also that of the District Court for the northern district of Alabama in *Corona Coal Co.* v. *Southern Ry. Co.,* 266 Fed. 726, affirmed on jurisdictional grounds, 260 U. S. 698, and of the District Court for the northern district of Ohio in *Cleveland & Western Coal Co.* v. *B. & O. R. R. Co.,* 283 Fed. 995.

In the *Corona case,* 266 Fed. 726, supra, the court held that it had no jurisdiction of a suit to enjoin a carrier from following the assigned car practice under authority of the emergency order of the

Commission, dated April 15, 1920. The contention was that the assigned car practice violated section 1, paragraph (12). The court held that it could not grant relief from this practice but that " the plaintiff can apply for, and doubtless receive, immediate redress from the Interstate Commerce Commission which * * * has jurisdiction of the subject matter of the plaintiff's complaint" * * *. The court said, among other things:

> In considering the effect and scope of this paragraph, the high and comprehensive administrative powers and duties of the Interstate Commerce Commission must not be forgotten; and it is well to remember that the acts of Congress furnish repeated evidence of a legislative policy to broaden and add to, rather than to narrow and subtract from, the powers and useful work of the Commission * * *. (p. 729.)
>
> On consideration of paragraph 12 and the other provisions of the Transportation Act, and the purpose for which the Interstate Commerce Commission was created and clothed with authority, I am constrained to believe that the plaintiff has presented a case for administrative intervention, and not one calling for the exercise of a judicial function. At the expense of repetition, I must say that paragraph 12 does not call for a pro rata division of assigned cars, *nor does it say what shall be done with them,* except that they shall be counted against the mines to which they are assigned (p. 733). (Italics ours.)

In the *Cleveland & Western Coal Co. case,* 283 Fed. 995, 997, supra, the court, following the decision in the *Corona case* held that it had no jurisdiction of an injunction suit brought against a railroad on the ground that its practice of assigning cars was in violation of paragraph (12), since the question as to whether that practice should be permitted or abolished was one within the administrative discretion of the Commission.

In addition to the *Corona case* and the *Cleveland & Western case,* the only cases involving interpretation of paragraph (12) are *B. & O.* v. *Lambert Run Coal Co.,* 267 Fed. 776, and *Freeman* v. *United States* 4 F. (2d) 13.

In the *Lambert Run case* the Circuit Court of Appeals for the Fourth Circuit held that paragraph (12) as a matter of law required pro rata distribution, but that an emergency order of the Commission under paragraph (15) of section 1, which authorized the assigned car rule, had the effect of suspending the requirements of paragraph (12). The court also held that it had no jurisdiction because the suit had not been instituted in a three-judge court. This Court sustained the lower court on jurisdictional grounds. *Lambert Co.* v. *B. & O.,* 258 U. S. 377. The *Lambert Run case* can furnish no comfort to appellees herein, because according to that decision the law itself requires what the Commission has ordered in the *Assigned Car case,* namely, pro rata distribution.

In the *Freeman case,* suit was brought by the United States at the instance of the Commission, before the first decision in the *Assigned Car case,* to enjoin the receivers of a railroad from furnishing cars for railway fuel at certain mines without counting the cars against the mines. The lower court granted an injunction and the Circuit Court of Appeals sustained the decree of the lower court with an exception not material here. It is somewhat difficult to determine from the opinion whether it is the view of the court that paragraph (12) requires pro rata distribution as held in the *Lambert Run case* or requires distribution in accordance with the assigned car rule, or whether the court merely intended to decide that since there was admittedly no taking into account of the fuel cars in determining the share of the fuel mines under the assigned car rule, the pro rata rule, or any other rule, there was a violation of the statute. Apparently, however, the court holds that the assigned car rule is required by law. Nevertheless, the court took pains to distinguish the case on the grounds, among others, that the suit was brought at the request of the Commission and the failure to count cars at all was admitted in the pleadings.

We submit that paragraph (12) of section 1 when subjected to every conceivable test of statutory construction clearly shows that it authorizes, and was intended to authorize, the Commission to do the very thing it has done, namely, to require pro rata

distribution and the elimination altogether "of the evil of what is known as 'assigned cars'."

**(h) The lower court misconstrued the emergency provisions of section 1 (15)**

The lower court construed paragraph (15) of section 1[14] to mean that the "use [of private cars]

[14](15) Whenever the Commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the Commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency and serve the public interest, and upon such terms as between the carriers as they may agree upon or in the event of their disagreement, as the Commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them.

is excluded from the power conferred by Congress upon the Commission to make directions, with respect to car service, by confining its power in making such directions, to car service without regard to the ownership of cars as between carriers." This remarkable conclusion is so clearly fallacious that it hardly deserves comment. According to the view of that court, as we understand it, the Commission's Service Order No. 23 issued under its emergency powers on July 25, 1922, and providing that in the supply of cars to mines the carriers should place, furnish and assign such mines with cars suitable for the loading and transportation of coal for certain classes of consignees and in a certain order, would not apply to coal to be moved in private cars. The service order could thus be nullified by the use of private cars. Such an unreasonable interpretation of the language of the paragraph seems inconceivable. This is particularly true since the emergency authority of the Commission in prescribing service order No. 23 has been so clearly sustained in *United States* v. *Michigan Portland Cement Company,* 270 U. S. 521, and *United States* v. *Koenig Coal Co.,* 270 U. S. 512.

The lower court also apparently decides that a practice found by the Commission to be reasonable in a time of emergency can not be condemned as unreasonable in the absence of an emergency. (Akron, R. 71.) This conclusion is, we submit, equally unsound.

As to its powers under paragraph (15) the Commission, as we have already pointed out, said, among other things:

> As stated in our original opinion, however, emergencies may arise when for a time a carrier may be unable to secure its coal. But we are not here dealing with the question of car distribution under the emergency provisions of section 1, paragraph (15). In our original report we expressly pointed out that the rule which we prescribed was not to preclude us from authorizing necessary assignment of cars in case of emergency. The question of a just and nondiscriminatory rule under the provisions of section 1 and section 3, with which we are now dealing, is a different question from that of a rule to be prescribed in case of emergency. The distinction is recognized in paragraph (15), where it is provided that we may suspend car-service rules at such times. (93 I. C. C. 724.)

Certainly if the Commission gave a particular city preference in the placement and movement of cars under its emergency powers in order to relieve suffering from some disaster to that city, this would not justify giving such preference in ordinary periods of car shortage.

**II. THE COURT ERRED IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE COMMISSION CONCERNING AN ADMINISTRATIVE QUESTION WITHIN THE COMMISSION'S DISCRETION**

"The courts will not review determinations of the Commission made within the scope of its powers

or substitute their judgment for its findings and conclusions." *United States* v. *New River Co.*, 265 U. S. 533, 542. Nor will they "examine the facts further than to determine whether there was substantial evidence to sustain the order." *Interstate Com. Com.* v. *Union Pacific*, 222 U. S. 541, 548. As pointed out by this court as late as December 13, 1926, in *Virginian Ry. Co.* v. *U. S.*, — U. S. —.

> The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal "informed by experience." *Illinois Central Railroad Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454.
>
> This court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541.

Appellees owning or using private cars contend that the order is not supported either by the findings in the reports or by the evidence which was before the Commission. They, therefore, introduced that evidence in the court below. The railroad appellees, on the other hand, rely only upon the findings in the reports to support their claim that the order is invalid. It is true that, over objection, they introduced testimony, which was not before the Commission, to show that certain of them are "affected in a definite way by the order," but ad-

mittedly this had nothing to do with the issue as to the validity of the order. (Akron R. 21.) The lower court held that "there are no sufficient facts set out in the commission's report upon which to base findings of such discriminatory and preferential practices as to justify an order of universal application such as has been entered in this case." (Akron R. 75.)

**(a) The Commission's finding that the assigned car rule is not justified on the ground of necessity is amply supported by the evidential findings in the reports and also by the evidence before the Commission**

The ultimate decision of the lower court seems to have been largely influenced by its conclusion that the assigned car rule is a necessity. (Akron R. 66, 70, 71.) In this it clearly substituted its judgment for that of the Commission and committed a fundamental error.

As to the necessity of the assigned car, we call attention again to the fact that of the 3,073 carriers by railroad named as respondents in the Commission's order, only 35 carriers, appellees herein, have challenged the validity of the order.

In substance, as the Commission shows in its report, the argument as to necessity resolves itself into the proposition that carries by discriminating in their own favor under the assigned-car rule can obtain coal at less expense. The result of this is "practically a payment by the operator to the railroad company for cars by way of reducing the price

of fuel coal" and railroads obtain an advantage, claimed by them to be more than $100,000,000 a year (93 I. C. C. 724), at the expense of other shippers and of the public at large. In considering this phase of the case the Commission pointed out that—

> the fundamental purpose of the act is equality of treatment in rates and service, and this principle may not be violated merely because the carrier in that way may operate at less expense. If this were not true a carrier in times of car shortage could restrict its car supply to a few large and well operated mines on its line and ignore the remainder. (Id. p. 721.)

The Commission on this point quoted from the opinion in *U. S.* v. *Illinois Cent. R. R. Co.*, 263 U. S. 515, 524, where in a discrimination case under the act it was pointed out "self-interest of the carrier may not override the requirement of equality in rates," and said:

> That was a rate case, but the principle is applicable in a car distribution case, that a carrier's self-interest may not override the requirement of equality in car distribution. See also *Int. Com. Comm.* v. *Balt. & Ohio R. R.*, 225 U. S. 326. (Id. p. 721.)

In our statement of the case we have set out at some length the Commission's findings concerning the claimed necessity of the assigned-car rule. The reports show that a large volume of evidence was introduced by railroads on this subject and that

the matter was gone into thoroughly by the Commission. The practices of carriers which do not obtain their coal by preferential placement of their cars under the assigned-car rule was described. It was pointed out that "many large and important carriers in representative sections of the country have secured their coal during periods of car shortage without resorting to the use of assigned cars," that "many others have secured large portions of their fuel supply in the same manner" and that the "evidence in the original record and upon the further hearing also shows that public utilities and quasi-public utilities have been able to secure their coal without the use of the assigned cars." After pointing out the methods used by carriers to obtain their coal without resorting to the assigned car rule, the Commission said:

> While the carriers contend that these methods are impracticable as substitutes for the assigned-car rule, the experience of carriers and other public utilities and quasi public utilities, which do not depend upon this rule in securing all or a large part of their fuel, and the other evidence in the record on this subject, convince us of the practicability of securing railway fuel at reasonable prices in the absence of the assigned-car rule.
>
> As stated in our original opinion, however, emergencies may arise when for a time a carrier may be unable to secure its coal. But we

> are not here dealing with the question of car distribution under the emergency provisions of section 1, paragraph (15). (93 I. C. C. 724.)

Since the railroads in the present case have not brought before this court the evidence which was before the Commission (*Edward Hines* v. *U. S.*, 263 U. S. 143, 148) but attack the order upon the findings in the report and since the Commission is not required to set forth all of the voluminous evidence upon which it bases its conclusions (*Manufacturers Ry. Co.* v. *U. S.*, 246 U. S. 457, 487), the finding that the carriers are not justified in following the assigned-car rule on the ground of necessity is final and conclusive.

It should be noted that, in the *Traer case*, it was contended that the only practicable way for a railroad to obtain coal was by following the practice which the Commission there condemned. That order as previously pointed out was sustained by this court in the *Illinois Central case*, 215 U. S. 452.[15]

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[15] In the record in the Illinois Central case, No. 233, filed in the clerk's office of this court, the following quotation from page 13 of the affidavit of the purchasing agent of the Illinois Central illustrates the contention as to impracticability: "If said order of the Interstate Commerce Commission was put into force and effect by the railroad company, and if, in times of car shortage, there was counted against the mines the cars used in transporting company coal and there was no pro rata share of cars at the said mines of cars for commercial business, the mine could not handle the nut, pea, and slack coal, which are the by-products in the production of said

Appellees owning or using private cars emphasized in the court below what they claimed to be the necessity of using private cars under the assigned car rule in conducting their businesses, although such cars constituted only about two-thirds of the 29,000 privately owned coal and coke cars in this country and only about two per cent of the total open-top coal cars of the railroads. (R. 1025, 1495.)

As also pointed out in our statement of the case, the Commission carefully considered the contentions of private car owners as to the necessity of the assigned car rule and found that there was no necessity justifying preferential placement of private cars under that rule. It is unnecessary to repeat here those findings, but in view of the contention of appellees owning or using private cars that the evidence before the Commission does not support its findings, we shall refer here briefly to some of the voluminous evidence on this phase of the case.

The Commission points out, and cites illustrations in its report showing (93 I. C. C. 734), that

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lump coal, and the contract made by the mine owners could not be carried out, and therefore, in the judgment of your affiant, it would be impossible to make contracts with coal operators or with coal mines to furnish lump fuel coal in sufficient quantities to meet the requirements of the railroads, and said order of the Commission would, in its operation, prevent the railroad company from contracting for a sufficient supply of coal to meet its requirements, and would practically deny to the railroad company the right to make the contracts, which its duty as a common carrier makes essential for it to do."

"many of the private car owners secure large quantities of coal without the assigned car." In this connection the record shows, among other things, that the Carnegie Steel Company and the other subsidiaries of the United States Steel Corporation own 5,200 cars (R. 1355) and "in normal times the various plants of these steel companies require to have shipped by rail, approximately 20,000,000 tons of coal annually, 5,000,000 tons of which are shipped in private cars of these companies. Of this 20,000,000 tons, approximately one-half is used in the mills for producing gas and steam and one-half is used in by-product coke ovens. Of the 5,000,000 tons moved in private cars, approximately 25 per cent is used for gas and steam purposes and 75 per cent in the by-product coke ovens." (R. 1351.) "Most of the coal which we do not secure in private cars is from our own mines, although we are also purchasers of coal under contract with outside companies. We are not concerned about the total output or partial output feature. The contract is for so many tons a day. When there is such a contract it is variable, depending upon business conditions and the prime feature of the contract is the quality." (R. 1358.) "About 50 per cent of the by-product coking coal" of the Youngstown Sheet & Tube Company "is hauled in private cars." (R. 1368.)

With respect to the Pittsburgh Plate Glass Company referred to in the report (93 I. C. C. 734) Mr.

Belleville testified that of the 269 private cars of that company "151 are used in carrying coal." This company has factories at Ford City, Creighton, and Charleroi, Pa., Kokomo, Ind., and Crystal City, Mo.; also a large chemical plant at Barberton, Ohio, and a large limestone operation at Fultonham, Ohio. (R. 1271.) The private coal cars are used only "at the Ford City plant for hauling coal from the mine at Creighton to Ford City, a distance of 22 miles. That is on the Conemaugh Division of the Pennsylvania." (R. 1272.) "We have a lot of plants where we do not use private cars. They all use coal." (R. 1274.)

As to the Youngstown Sheet & Tube Company, which is shown in the report as receiving 49 per cent of its coal in system cars, see R. 1363. As to the New York Edison Company and the Consolidated Gas Company of New York, each of which is shown as receiving about two-thirds of its coal in system cars, see R. 1445 and R. 1456, respectively. In addition to these instances pointed out in the report it is to be noted that the Bethlehem Steel Company obtained coal in system cars from various mines in West Virginia and Pennsylvania on the Western Maryland, the Pennsylvania Railroad, Cambria & Indiana, Baltimore & Ohio, and B. R. & P. (R. 1599.)

Mr. Rust testifying for the Seaboard By-Product Coke Company and other companies stated that "our Minneapolis [by-product coke] plant * * *

takes the coal via the docks. It is specific coal stored for us. As to assigned cars, we have used them at the low end of the lakes, but generally we do not, because the coal goes up the lakes at a time when it is easy to get." (R. 1238.) He said, " We are producing in St. Paul 250,000 tons of coke per annum. Almost all of that coke is taking the place of anthracite in the Twin Cities." (R. 1220.)

He also testified that " there is not any question that we can make coke with Illinois coals. We have done it frequently. But the question is whether coke made from Illinois coals is worth what you save whether you are getting an inferior grade of coke and the difference in quality using the Kentucky coals would justify the additional freight. * * * There is very decidedly a prospect that the by products furnace will broaden the use of certain coals and increase their value." (R. 1220.)

Mr. Berwind of the Berwind-White Company testified that coal from the Berwind properties on the Norfolk & Western moved out in system cars, there being no private cars at all on that railroad. (R. 1281.) Considerable stress was laid upon the necessity of private cars in conducting his bunker coal business. (R. 1281.) This as has been previously pointed out was urged as justification for the special allotment of 500 system cars to his company in the *Jacoby case*, 19 I. C. C. 392, 395, where such allotment was "condemned in strong terms" as an undue discrimination.

In the testimony in behalf of the Bethlehem Steel Company much stress was laid upon the necessity of certain kinds and grades of coal. In this connection the following admissions, among others, on cross examination are of interest:

> I testified to the necessity of a uniform quality of coal. It is true that *in the same* mine, for instance, our number 1, 2, 3, 7, and 8, at Heilwood, *there is quite a considerable variation in the chemical composition of the coal.* In some place in that particular mine there will be a low sulphur content, particularly, and in another place in the mine a considerably higher sulphur content. We mine all that coal and ship it out, whether it be high quality or low quality, to some of our plants which use coal. We take that coal and if it equals the composition, we wash it to meet the chemical composition which we believe is imposed upon it. That washing has been done for years at Steelton. In using it for Bethlehem, we prepare that coal so that it meets our limitations so that we can mix it with lower sulphur coal. As to whether it would be practicable to wash other coals of the same general make-up, quality, and characteristics from other mines, the answer is "Yes." It is practicable to wash coal. At times we have washed all of that coal from the Heilwood mines, depending upon its chemical composition, and as to how it was showing. It varies from less than one per cent up to one and three-quarters per

> cent in sulphur. One and three-quarters per cent sulphur content is regarded as pretty high. That is the reason we wash it. (R. 1296, 1297.)

In this connection note the testimony of Mr. O'Neill, of the Central Pennsylvania Coal Producers Association, as to the vast quantities of by-product coal available in Pennsylvania superior in quality to that used by Bethlehem Steel from its Heilwood mines and of equal quality to that used by it from other mines. (R. 1489.) He also named a number of companies "supplying bunker coal without private cars." (R. 1499.) In referring to some of their mines on the South Fork Branch of the Pennsylvania Railroad he said, "These mines I am talking about have cut into some of the Berwind mines and there could not be very much difference in the coal." (R. 1496.) As to the large quantities of by-product coal in West Virginia and Virginia on the Norfolk & Western and Virginian Railways see testimony of Mr. T. F. Farrell. (R. 1540.)

The Commission pointed out in its report that many of the private car owners did not obtain their cars "until the abnormal period following the termination of Federal control of railroads" on March 1, 1920. (93 I. C. C. 734.) This was true of the Steel Company of Canada and affiliated companies (R. 1338), International Harvester Company and its subsidiary (R. 1414), Bethlehem Steel Company (R. 1302), Youngstown Sheet & Tube Company

(R. 1331, 1362), Seaboard By-Product Company (R. 1221), Chicago By-Product Company (R. 1203, 1221), Pennsylvania Coal and Coke Company (R. 1012), Ford Motor Company (R. 1386), and Public Service Electric Company (R. 1257), and as to a large proportion of the cars of the subsidiaries of the United States Steel Corporation (R. 1357). The total number of privately owned cars in the United States in June, 1916, was 14,665; in June, 1920, 18,958; in June, 1921, 26,007 (R. 1563); and in June, 1923, 29,034 (R. 1489).

The Commission also pointed out that while since 1916 coal car shortages have been common, a condition of coal car surplus may be more regularly contemplated after the war and postwar difficulties, 93 I. C. C. 735. In this connection Mr. Gutheim testified that "until we reached the war period the coal car shortages in this country did not exist ordinarily more than 10 per cent of the time, and then it seldom existed as a nation-wide proposition." (R. 668.) Mr. Berwind testified "there are three months in the year when the private car serves a purpose; there are not over three months in any normal year where there is not full supply of cars to every operator on the railroad." (R. 1287.) As to this it is to be observed that Mr. Rust testified "at our two plants, Chicago and Seaboard, we furnish quite large storage facilities. We have to store, try to store, from one to two months' supply of coal. We do that in order to protect our-

selves against any possible breakdown in transportation facilities, and we keep turning that coal over. That is we mix a little stored coal with fresh coal * * *." (R. 1227.) As to the United States Steel Company and its subsidiaries it was testified "when coal can be obtained and stored, the manufacturing companies generally carry a sufficient supply of coal in stock to balance over any ordinary period of irregular coal supply and for the purpose of providing against interrupted transportation services and railroad car shortage." (R. 1354.) As to Youngstown Sheet & Tube Company it was testified that "We try to go into the winter with a supply at Indiana Harbor that will guard against any possible shortage of transportation over the winter." (R. 1361.)

As to the Public Service Electric Company it was testified "Our normal storage is about 90 days. I mean the capacity of storage, which is as high as it is considered wise to go." (R. 1263.) The New York Edison Company stores large quantities of coal. It was testified "that we should have always in storage, to guarantee our service to the public there, a minimum of 60 to at least 90 days." (R. 1443, 1444.)

The evidence shows that there is no necessity for the preference enjoyed by private car owners under the assigned car rule, and the Commission's findings being amply supported by the evidence are final.

**(b) The unfair and preferential effect of the assigned car rule is clearly shown by the Commission's findings and also by the evidence before it**

The effect of the assigned car rule in bringing about preferences in favor of assigned car mines at the expense of other mines and of the public at large has already been referred to in our statement of the case and is fully described in the Commission's reports. (93 I. C. C. 718–721; 80 I. C. C. 542–550.)

While the assigned car rule of the *Traer case* did much toward remedying conditions prevailing at that time (93 I. C. C. 717, 729), the exhaustive hearings in the proceeding before the Commission in which the order here involved was made showed that private car owners and railroads had practically defeated the underlying principles of fairness and equality of treatment of that rule by concentrating their cars at particular mines so as to give such mines practically a full-car supply which was much in excess of the pro rata shares on the basis of all cars distributed and still greater in excess of the percentage distribution to unassigned car mines.

That private car owners and railroads should be permitted to continue to have such a preference was the very thing contended for in the proceeding before the Commission and to which appellees urge they are now entitled. It is clear, therefore, that the natural and necessary effect of permitting the

assigned car rule to operate in the future will be to give assigned car mines a much greater car supply proportionately in times of car shortage than mines not receiving private cars or railway fuel cars. The evidence abundantly establishes the great inequality and unfairness of treatment which has actually resulted under this rule and the severe injury to unassigned car mines.

A large volume of evidence was before the Commission, showing that the effect of the assigned car rule is to diminish the supply of cars at unassigned car mines. As pointed out by the Commission in its second report, page 718, Counsel representing the American Railway Association, admitted that the effect of abolishing that rule would be to increase the car supply at unassigned car mines, although such increase was claimed to be small. (93 I. C. C. 718.)

It will probably be contended that since railroads must use a certain number of cars to obtain coal in order to operate, the supply of system cars will not be affected by abolishing the assigned car rule. The unsoundness of this contention is illustrated by the following example:

> Suppose there are four mines on a railroad, each having a rating of 30 cars and each ordering each day its rating. One mine, A, is a railroad owned or fuel-contract mine, from which the railroad takes the entire output daily. The other three mines are commercial mines, B, C, and D. Suppose

on a particular day the railroad under the assigned car rule places 30 railway fuel cars at A, the railroad mine, and has only 30 system cars which it divides equally among the other three mines. Then the per cent car supply which each mine would receive would be 100 per cent at the railroad mine and 33⅓ per cent at each of the other three. However, under the pro rata rule prescribed by the Commission, suppose that the railroad in order to avoid placing its fuel cars in excess of the pro rata share of any mine, places the 30 cars necessary to haul its fuel not at one mine but divides them between two mines, its mine, A, and mine B. Then each of these two mines would have 15 railway fuel cars and the 30 system cars would be divided between mines C and D, each of these receiving 15 cars. The railroad by distributing its 30 cars for railway fuel to two mines instead of one is able still to receive 30 cars of coal but by thus spreading its purchases and distributing all cars on a pro rata basis, it has increased the supply at mines C and D, which furnished no railway fuel, from 10 cars to 15 each, or an increase of 50 per cent.

The same thing would be true as to private car owners if with a view to continuing their cars in revenue service they distribute them to mines so that they will not exceed the pro rata shares of such mines. This is irrespective of the Commission's findings showing that the practical effect of the assigned car rule is to take away labor and facilities

which could be used to move cars for unassigned car mines. Under those findings, of course, the elimination of the assigned car practice would necessarily mean more cars for the unassigned car mines.

"If private cars should be withdrawn from carriers' service and the remaining supply of cars should be inadequate," the Commission, as it points out in its second report, has "power under the act, to require the carriers to furnish an adequate supply." (p. 737) See Section 1 (21).

As to the Commission's findings concerning the effect of the assigned-car rule on costs of mine operation and on mine labor, see pages 721 and 735 of the second report and page 550 of the first report. For reference to part of the voluminous evidence with respect to mine costs, see testimony of Mr. Lunsford, Fordson Coal Co. (R. 1380); Mr. Callahan, Traffic Manager, National Coal Association (R. 811); Mr. Reed, National Coal Association (R. 832–833), and his exhibits 37, 38, and 39 (R. 1559–1560); Mr. McAuliffe, Detroit Edison Company (R. 952); Mr. Davin, C. & O. R. R. (R. 786); and Mr. J. B. Neale, Coal Operator on P. R. R. (R. 888). With respect to mine labor see, for example, testimony of Mr. Huber, Coal Operator on P. R. R.; Mr. Lunsford (R. 1380); Mr. Hutchinson (R. 1270); Mr. Callahan (R. 812); Mr. McAuliffe (R. 948, 956); Mr. J. B. Neale (R. 887, 888); Mr. Brophy, United Mine Workers (R. 879); Mr. Hammond, Coal Operator on L. & N. (R. 1529-

1530); and Mr. Marland, also a coal operator on L. & N. (R. 1532).

As to inequality in working time see, for example, testimony and exhibits of Mr. O'Neill, Central Pennsylvania Coal Producers Association (R. 1491, 1605–1608); testimony and exhibits of Mr. Boyd, Harlan Coal Operators Association (R. 1505, 1611–1613); and statements filed by the L. & N., C. & O., and P. R. R. at request made on further hearing (R. 1624–1626).

The following significant finding by the Commission as to the advantage which private car owners obtain under the assigned car rule has already been referred to:

> Further evidence of the advantage which private-car owners received from the preferential placement of their cars under the assigned-car rule is to be found in the fact that they are willing to lose many hundred thousands of dollars in the operation of their cars in return for the advantage of such preferential placement during car-shortage periods. The railroads pay to private-car owners an allowance of 1.5 cents per mile for use of their cars. This, it was testified, was hardly sufficient to pay the cost of repairs alone. The Westmoreland Coal Company showed, for example, that for the two years and nine months ending September 30, 1923, the revenues received for the use of its 2,019 cars were $784,424, expenses for repairs amounted to $820,755, total expenses includ-

> ing interest and depreciation amounted to $1,329,488, and the net loss to the company was $545,064 * * *. (93 I. C. C. 736.)

As to this see exhibit of Mr. Hutchinson, Westmoreland Coal Company. (R. 1595–1596.) Mr. Rust, of Seaboard By-Product Coke Company and Chicago By-Product Coke Company, testified that a loss of $800,000 was sustained on the 1,000 private cars of these companies from the time of their acquisition in the summer of 1920 to September 30, 1923. (R. 1227, 1252.) Mr. Berwind testified "The figures show that the use of the car [private car] is an added expense to us. It is correct that the railroad did not give us enough to pay for the use." (R. 1287.) The witness for the subsidiaries of U. S. Steel Corporation testified "As is commonly known, the ownership of private cars in and of itself is not an economy, but an expense and burden to the owners." (R. 1352.) Mr. Gross testifying for Bethlehem Steel Company said "I know they [private cars] were operated at a loss, but the specific figures I can not give. The question of increasing the allowance for these cars has not been taken up with the railroads by us. I am sure that since these cars were purchased they have enabled our mines to secure a greater supply of cars than they would have received had we not owned these private cars." (R. 1348.) Other testimony was to substantially the same effect. See as to Pittsburgh Coal & Coke Company (R. 1012) and Public Service Electric Company (R. 1258).

It is to be noted that the court erroneously holds that the allowance of one and one-half cents per mile was fixed by the Commission. (Akron R. 60.)

A serious result which will follow if the assigned-car rule is continued is that the number of private cars will increase. (93 I. C. C. 737.) Competitors of private car owners will be forced to buy cars in self-defense and the result will be not only to cause still greater discriminations against unassigned car mines (93 I. C. C. 737), but to add unnecessary cars to the total number of railroad cars owned so that during periods of car surplus railroads will be paying private car mileage while their own cars are lying idle. "Private car owners, it is to be observed, use their cars throughout the year, both in periods of car shortage and in periods of full car supply." (93 I. C. C. 736, R. 1228, 1267, 1287, 1305, 1365, 1595, 1604.) It is therefore apparent that the effect of keeping in force the assigned-car rule for which appellees contend will result in extravagance of outlay on the part of the carriers and be contrary to the principles of economy and efficiency provided for in section 15a of the Interstate Commerce Act. As already shown, a large proportion of the private cars were acquired during the abnormal period which followed the termination of Federal control at a time when the difficulties encountered were caused by shortage of motive power, congestion, break-down in service, etc., rather than by the fact that the carriers had in service an inadequate number of cars. (R. 1355, 1331, Ex. 23, 1557, 722.)

**(c) The Commission's findings and the evidence before it show that the placement of assigned cars at mines under the assigned car rule gives such mines an unreasonable and preferential share of the services of railroad employees and of facilities other than cars and results in depriving unassigned car mines of services and facilities to place system cars at their mines**

While as above indicated the Commission's order is clearly sustainable irrespective of its findings as to services and facilities other than cars, those findings and the evidence supporting them establish even more firmly and convincingly the validity of the order.

The lower court was apparently concerned primarily with this phase of the case when, in sustaining the contentions of private-car owners, it held:

> * * * findings of actual discrimination and preference, granting that they are sufficiently established to justify orders of the Commission prohibiting the carriers from pursuing such practices, are not sufficiently general in their scope nor substantial in their result to support the sweeping order of the Commission. (Akron R. 74.)

In considering this question it is to be borne in mind that the purpose of the proceeding which the Commission instituted was not to ascertain damages for past practices but to determine a reasonable rule for the future. It was, therefore, proper to consider not only what had been the practice under the assigned car rule but what would be the natural

and probable consequence in applying that rule in the future. The Commission's findings show that it carefully considered the causes of car shortages and the effects; that the natural consequences of applying the assigned car rule will be to give assigned car mines an unjust and unreasonable share of railroad services and facilities other than cars and to deprive unassigned-car mines of such services and facilities; and that the only reasonable and practicable rule which will reach and eliminate such unjust and preferential practices is the pro rata rule which it has prescribed.

In its first report the Commission at page 547 pointed out, among other things, how "Car shortages are usually accompanied by conditions of alarm on the part of the consuming public and a demand for the coal which becomes more excited as the coal-car supply lessens," how more mines are then opened, and how "This makes more difficult the process of distribution as the cars in service can not be handled as efficiently," and how "The increase in demand and mine rating must be met by a pro rata distribution of the available cars, and thus the supply, already diminished because of the lesser efficiency possible in movement, is further diluted in the process of ratable distribution according to the enlarged capacity."

The Commission on page 731 of its second report quoted as follows from the report of the American Railway Association Conference Committee to the

United States Coal Commission, dated June 1, 1923, which was put in evidence on the further hearing as Exhibit 42, by Mr. Boyd, Secretary of Harlan County Coal Operators' Assn., R. 1504:

> "Coal Car Shortages," while a term generally used, is commonly a misnomer; "Transportation Shortage" would be more exact or more properly descriptive. From the viewpoint of the mine management a "car shortage" exists when cars are not placed on mine tracks in sufficient quantity to fill car orders. From the viewpoint of the railroad management the situation may rather be considered a "Transportation Shortage," for at such a time there may exist no "car shortage" on the railroad as a whole. That is, even though all car orders are not filled there may be in the road's possession as many coal cars in the aggregate as in previous periods when the mines it served loaded a greater amount of coal and the needs of such mines for cars were more adequately or fully met.
>
> When labor disturbances cause abnormal demands for coal to be delivered in certain sections of the country within a certain period, the coal moves to meet these demands via routes and gateways in quantities far above the normal, or average, movement through such channels and also via unusual routes. Because of this abnormal coal movement, yard tracks, main tracks, terminals, lake and tidewater piers and various other facilities become over-taxed or congested,

> with a consequent slower movement and longer turnaround of cars. This results in what the mine management terms a "car shortage."

This report was signed by 33 representatives of the carriers, including officials of the Louisville & Nashville, and was admitted in evidence without objection. (R. 1504, 1610.)

The Commission further said, page 731:

> As we pointed out in the *Rail and River case,* [14 I. C. C. 86], "A shortage in cars usually if not invariably is accompanied by a shortage in some one or more of the other facilities of the carrier." Locomotives, tracks, employees, terminal facilities, etc., are so related to the number of cars in service that an excessive demand for cars places an excessive burden upon such other facilities. Some of the more aggravated cases of discrimination shown under the assigned-car rule were during car shortages resulting in part at least from lack of motive power and limited track facilities. Some of these cases were cited by private-car owners as examples of the necessity of the assigned car.

As illustrative of this the situation on the Louisville & Nashville was then pointed out and it was said, page 732:

> In determining upon a just and workable rule, we must recognize the fact that car shortages result from a general shortage in facilities, including terminals, motive power,

> etc., and that to permit private-car owners to have their cars placed at designated mines in excess of the pro rata allotment means that private-car owners will receive more than their fair share of those transportation facilities which they do not own, while to require pro rata distribution of cars is to bring about a just and nonpreferential distribution in conformity with the fundamental requirements of the act.

Mr. McAuliffe, a witness of wide experience in traffic affairs, who at one time was in charge of purchasing fuel for 15,000 miles of railroad (R. 948, 949.) and who appeared for the Kathleen Mine, Jackson County, Ill., Milwaukee Electric Railway and Light Company, Milwaukee, Wis., Wisconsin Gas Company, Racine, Wis., Detroit Edison Company, Detroit, Mich., and its subsidiary, the King Harlan Coal Company (R. 946), Harlan County, Ky., testified in part as follows:

> It is not ordinarily the shortage of cars that prevents a given carrier from supplying all of the mines located on its rails, but inability to supply an adequate measure of transportation, almost invariably chargeable to (a) insufficient sidetrack and terminal capacity; (b) congested terminals; (c) insufficient number of locomotives to move all cars loaded and empty. * * * No deviation from the practice of furnishing an absolute equitable distribution of all of the instrumentalities of transportation available

should be tolerated except in the case of an extreme emergency, which should be met by the Interstate Commerce Commission in the manner prescribed in the transportation act, 1920. (R. 699.)

I have specific knowledge of the results of the United States Steel Company's cars and coal movement, in some instances almost completely absorbing the remaining transportation facilities of the Louisville & Nashville Railroad. One of our companies has a local mine, and all mines are local in this territory, in the eastern Kentucky section served by the Louisville & Nashville R. R.. I have stood at that mine for days and watched the locomotives and train crews of the Louisville & Nashville R. R. hauling loaded and empty cars past our premises and the premises of our neighbors to the mines of the United States Steel Company to the absolute exclusion of the general commercial traffic. (R. 697.)

As I stated last July, I do not think the railroads of this country have had in the last 20 years that I have studied the situation and observed it closely a car shortage. I am speaking now about an insufficient number of cars. The trouble is that we attach too much importance to the so-called coal cars—which is not a coal car but a freight car built and operated for the movement of various commodities. The real trouble with the railroads has been the lack of other facilities, and no better evidence of that situation is

required than a glance at the average miles per day that the freight car makes in service. (R. 949, 950.)

Too many of us look at this transportation situation from too narrow a viewpoint. A coal car is absolutely useless in and of itself. It requires so many other things to move it and make it useful to either itself or the operator that the standards that we measure the situation by, the number of cars in the field, and so forth, are entirely erroneous and insufficient. (R. 961.)

I think that the effort that is made generally to give preferential service to even a limited number of assigned cars reacts against the total movement, much as the craze for priorities that were put into effect during our early war experience slowed down the whole transportation movement of the country, and, in fact, very nearly strangled it. (R. 950.)

I think that during my experience, covering the period when I was in the railroad service and since I left the railway service, I never heard of as high a percentage of locomotives in bad-order condition as at the present time. I think it is now about 29.5 per cent of the total. I think the assigned car as well as the private car is an evil under any conditions. I think it tends to accentuate bad conditions and to create bad conditions when things are running rather normally. (R. 962.)

Mr. Huber, an operator on the South Fork Division of the Pennsylvania Railroad, testified, among other things:

> I attribute our troubles in the matter of car supply in our district to the assigned and private car, particularly the cars of the Berwind-White Coal Mining Company. * * * The service was very unsatisfactory all during the war period, but in 1920 a situation developed that I had never seen anywhere. * * * In April, 1920, we received 30 per cent distribution. In May the supply was 22 per cent. In June it was 20 per cent. By the 18th of June we had lost 75 per cent of our men. * * * We had lost our labor, and our production in 1920 was 75,000 tons less than our output in 1919, due to those cars. * * * The same condition obtained in 1922. * * * We have the data from November 8 to 17, inclusive, [1922] showing the distribution of assigned cars and system cars. During that period of eight days it shows that there were a total of 1,029 system cars passed through South Fork for the South Fork division, and 836 Berwind cars. * * * this experience in 1920 practically destroyed the good-will of our company. Our performance on contract was so bad that our customers could not realize that we were doing everything in our power. (R. 935, 936.)

The defense of the railroad has always been the operating conditions, the congestion at Altoona, inability to get over the mountain

> and so forth; but some how or other these Berwind cars are always up there waiting to move. (R. 938.)

Mr. Poston in testifying concerning mines with which he is connected in Ohio and West Virginia said:

> If the coal was put down just as soon as there was a car surplus we never would have occasion for an assigned car because we have no coal-car shortage. The trouble is that when these high prices prevail it dilutes every kind of transportation facility. It subdivides the effort of transportation and it subdivides the locomotives and the cars. (R. 1022.)

Mr. O'Neill, of Central Pennsylvania Coal Producers' Association, in describing conditions on the Pennsylvania Railroad said:

> In September [1922] there were 42,147 assigned cars available or 25.54 per cent of the total available, and in the peak of the car shortage, which was reached in February, there were 61,795 assigned cars available, as against 32,485 unassigned cars available, and the percentage of assigned cars of the total available was 65.5 per cent, or *two out of every three cars* placed in the eastern and central region of the Pennsylvania Railroad were placed at assigned-car mines. (R. 1491.)

Mr. Boyd, representing Harlan County Coal Operators' Association, in pointing out that the pro

rata rule of the Commission is the only practical rule, said:

> I say right now that in my opinion the only way these privately owned car mines can be restricted to their distributive share is in the manner in which the commission have already decided. It is all right to talk about shortage of locomotives and shortage of tracks and shortage of terminals and congestion at terminals, but nobody on earth can determine that thing, even the railroads themselves, when it is controlling. (R. 1518.)

Mr. Bower of the New York Central Lines testified:

> Car shortages are due to congestion. (R. 1126.)

Mr. Pearson, President of the New York, New Haven & Hartford, testified:

> Of course it is a fact that when there is a demand for cars in excess of the supply, an increase of cars presumably would improve the deliveries at destination; but when you speak of car supply I can not get it out of my mind that a railroad must be developed in its entirety in order that the cars may be used to their best efficiency. In other words, terminals, locomotives and shops, and so forth. (R. 740.)

Mr. Campbell, President of the Youngstown Sheet & Tube Company, an appellee herein, testified:

If we buy those cars, [private cars] the railroads do not have to buy them. They replace that many cars to the railroads, and they have more money to buy locomotives, which has been the cause of our troubles when we have been short of transportation more than the shortage of cars. They have not had the motive power to place the cars and move them promptly. In a great many cases, when there has been a big howl about shortage of cars, it has been shortage of power or shortage of terminal facilities, or one thing or another in the operation of the railroad. (R. 1325.)

I was only expressing my opinion, and I get that not only from our own people who are close to the operation of railroads, but I get it from the railroad executives themselves, under different conditions, and I have found many times when the press and when the people were talking about shortage of cars, really it was a shortage of power, and I am only expressing my particular opinion. That is not continuous. It does not always happen. Oftentimes there is a shortage of cars and there may be plenty of power; but I am talking about times—and you cannot put too much weight on that, because I am not an expert; I do not know anything about operating a railroad. It is just my general opinion that I am testifying from. (R. 1329.)

Mr. Davin of the C. & O. testified as follows:

Q. [By Mr. Bronson.] * * * There has been an apparent car shortage on the

C. & O. since about July 10th [1922] of this year, as I recall it. Is that an actual car shortage?

A. It is not what I would call a car shortage as much as it is a motive-power shortage, due to the shopmen's strike. The car shortage first appeared on July 10; that is, we were short of cars, although we had sufficient cars on the line but not sufficient power to move the cars. * * *

A. At the present time it [the car shortage] is due more or less to the failure of the connections to take our loads promptly, and the situation has turned from a car shortage and a power shortage to the inability of the connections to take currently.

Q. And that might again turn?

A. It might turn any day. (R. 789.)

The Commission in making its findings had before it evidence both comprehensive and typical in character. Throughout the record is to be found testimony concerning the causes of car shortages and the conditions accompanying them. In particular, the conditions on the Chesapeake & Ohio, Louisville & Nashville, and the Pennsylvania were shown. These, it is to be remembered, are not only three large coal loading carriers but are the three principal railroads on which private cars are used. On the Pennsylvania are to be found the 3,078 cars of the Berwind-White Coal Mining Company (R. 1596); the 2,019 cars of the Westmoreland Coal Company (R. 1263); the 500 cars of the Youngs-

town Sheet & Tube Company (R. 1358); a large proportion of the 3,975 cars of the Bethlehem Steel Company (R. 1597); and a large proportion of the 5,200 cars belonging to subsidiaries of the United States Steel Corporation (R. 1353–1355). Mr. O'Neill, testifying for the Central Pennsylvania Coal Producers Association, said that, in addition to the Bethlehem and Berwind-White cars, the 1,000 cars of the Pennsylvania Coal & Coke Company and the 600 cars of the Public Service Electric Company "customarily and constantly operate in the Central Pennsylvania District" (R. 1489); that he was quite sure that all of the private cars that came into that district operated on the Pennsylvania, and that there were not any on the New York Central (R. 1496). On the Louisville & Nashville are to be found the 2,240 cars of one of the subsidiaries of the United States Steel Corporation; the 650 cars of the Chicago By-Product Coke Company; the 500 cars of the International Harvester Company; and the 800 cars of the Ford Motor Company. (R. 1501.) On the Chesapeake & Ohio are to be found the 1,000 cars of the New River & Pocahontas Consolidated Coal Company, 800 cars of Steel and Tube Co. (property of Youngstown S. & T. Co. R. 1558), and 899 cars of other companies. (R. 1580.) In this connection, it is to be remembered that there are only about 29,000 private coal cars, about two-thirds of which belong to appellees.

The evidence shows that the use of private cars has been restricted to certain sections of the coun-

try, "particularly southwestern Pennsylvania; some in northern West Virginia, * * * southern West Virginia, southwest Virginia, and eastern and southeastern Kentucky." (R. 807.) Among the many important carriers which do not handle private coal cars at all are the Colorado & Southern, Denver & Rio Grande, and other carriers in that section; the Chicago & Northwestern, the Chicago, Rock Island & Pacific, Kansas City Southern, the Erie, the Norfolk & Western, and the New York Central Lines, except the Pittsburgh & Lake Erie. (Ex. R–53, R. 1614.) It is interesting to note that the Buffalo, Rochester & Pittsburgh, although handling private cars, distributes them upon a pro rata basis. (R. 1615.)

For part of the evidence as to the situation on the Louisville & Nashville see testimony of Mr. Boyd (R. 1500–1504, 1507–1510, 1520, 1524), and his exhibits (R. 1608–1613) and the testimony of Mr. Gutheim (R. 807). As to the situation on the Chesapeake & Ohio, see testimony of Mr. Higgins (R. 940–943) and Mr. Davin (R. 785–792). As to the situation on the Pennsylvania Railroad see testimony of Mr. Jones (R. 923); Mr. Watkins (R. 1005, 1011, 1012); and Mr. O'Neill (R. 1492–1499) and his exhibits (R. 1605–1608). As to these three carriers, see also R. 1624–1626. In addition to this evidence see, among other things, testimony of Mr. Maher (R. 964–965); Mr. Brackett (R. 844); and Mr. Galloway (R. 757, 758, 760–761), and his ex-

hibit (R. 1556), concerning the Baltimore & Ohio; and the testimony of Mr. Markham (R. 717) of the Illinois Central.

Private car owners in the lower court laid stress upon the admittedly overdeveloped coal mining industry and pointed to the fact that at times because of this overdevelopment carriers are called upon to furnish more cars than they would be required to equip themselves with under the law, and that the very purpose of the private assigned car is as a protection against such times. However, when such increased demands for cars arise from mines which have operated regularly and from mines which have sprung into operation, the insufficiency is felt not only in the number of cars, but in employees, locomotives, tracks, terminals, and other equipment of the carriers, and the assigned car rule operates to give private car mines an unfair and preferential use of railroad services and facilities other than cars. A mine, for example, which receives 100 per cent supply in private cars receives more service and more of the use of such facilities than a mine of the same rating receiving only a 50 per cent supply. The same unfair and preferential use results when there is a breakdown of the transportation machine because of strikes, weather conditions, or other causes.

In *Logan Coal Co.* v. *Pennsylvania R. Co.*, 154 Fed. 497, 503, supra, the court said:

> They [private cars] are placed upon the tracks of the defendant company, and *the engines and the train crews and the moving facilities of the company are taxed to transport these individual cars,* and there is no reason that I can see why they should not be regarded in the distribution of cars to shippers as part of the equipment, in order that the defendant company may be enabled to treat all shippers the same, and, as near as may be, at all times in the year furnish car facilities for the transportation of coal along its line, upon a basis fixed upon the rated capacity of the mine as ascertained by the methods adopted by the railway company. (Italics ours.)

Appellees and the court below apparently regard the order as invalid because there may be at times more than sufficient locomotives and tracks at the mines to move the cars which are there available. This, however, views the question from too narrow a standpoint. The supply at the mines is dependent upon the service of the originating carrier and its connections in bringing about prompt interchange and return of cars. A "slow-down" in movement increases the "turn-around" and decreases the supply at the mines. The responsibility of the original carrier is therefore not limited to its duty to move cars in the vicinity of the mines but extends to moving them over its lines to destination and back, or interchanging them with connecting lines and arranging for the return of these

cars or other cars. In view of the various provisions of the act providing for through routes, joint rates, interchange and return of cars, etc., the carriers are for many purposes to be regarded as one transportation system. *Missouri & Illinois Coal Co.* v. *I. C. R. R. Co.,* (1911) 22 I. C. C. 39; *Dayton-Goose Creek case,* 263 U. S. 456.

The carriers themselves through the Car Service Division of the American Railway Association in many respects treat the railroads as one transportation system. For example, a surplus of cars on one railroad will be diverted to other railroads where they are needed. (R. 663, 683.) See *Southwestern Ry. Co.* v. *Arkansas,* 217 U. S. 136, 150, as to a railroad's duty to furnish cars and the Commission's jurisdiction over rules of the American Railway Association involved in performing that duty.

The lower court cites certain cases (Akron R. 74) to show that the Commission's order was too broad. These involved rates or allowances and were unlike the cases here involved. In this connection, it should be pointed out that the court apparently overlooks the broad provisions of section 1 empowering the Commission to make reasonable rules of car distribution in addition to its powers under the discrimination provisions of section 3.

The findings of the Commission as to the unfair and discriminatory use of railroad services and facilities other than cars amply sustain its ultimate findings of unreasonableness and undue preference

and prejudice, and are clearly supported by the evidence. The situation as to railroad services and facilities is a complicated one and requires practical treatment. Upon all the evidence the Commission was fully justified in prescribing by its order a rule which is reasonably designed to remove, and is the only practicable method of removing, the unjust discriminations and unfair practices under the assigned car rule in the use of the services of railroad employees, motive power, tracks, and other facilities than cars. See *Penna. R. R. Co.* v. *Kittaning Co.*, 253 U. S. 319, 323, and *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, 283, dealing with the Uniform Demurrage Code which applies throughout the country; *Kansas City So. Ry* v. *U. S.*, 231 U. S. 423, 444, dealing with the uniform system of accounts prescribed by the Commission; and *D., L. & W. R. R.* v. *U. S.*, 231 U. S. 363, 370, sustaining the Commodities Clause.

In the *O'Keefe case*, 240 U. S. 294, 303, this court in sustaining an order of the Commission said:

> * * * It is said there was no evidence to enable the Commission to fix a just compensation to that line for a haul of a given number of miles as compared with the just compensation for a haul of a greater or lesser number of miles; no evidence as to terminal expenses, or cost of road haul, or the relation between these factors, or as to other elements which should be taken into account in fixing a division according to the length of haul. But the evidence showed that some

> limitation was called for, and, in general at least, furnished the materials upon which to base it. *A tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others.* (Italics ours.)

It was then said, at page 303:

> The tap-line problem is exceedingly complex, and the importance of a general rule based upon simple elements easily ascertained is obvious. We are not able to say that the adoption of the mileage basis is, under the circumstances, sufficient to sustain a charge of arbitrary action.

As pointed out in the *Union Pacific case,* 222 U. S. 541, 548, *supra,* the courts "will not examine the facts further than to determine whether there was substantial evidence to sustain the order." They will not "consider the weight of the evidence." *New England Divisions case,* 261 U. S. 184, 204. The Commission's findings are "fortified by presumptions of truth, 'due to the judgment of a tribunal appointed by law and informed by experience.'" *I. C. C.* v. *C., R. I. & P. Ry.,* 218 U. S. 88, 110. In the *Union Pacific case* this court, in commenting upon the evidence, said at page 550:

> With that sort of evidence before them rate experts of acknowledged ability and fairness, and each acting independently of the other, may not have reached identically the same conclusion. We do not know

> whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive. * * *

See also *I. C. C.* v. *Louis. & Nash.*, 227 U. S. 88, 100.

The lower court substituted its judgment for that of the Commission in clear violation of the principles laid down in those decisions.

### III. OTHER CONTENTIONS OF APPELLEES

#### (a) Contention that the order discriminates against owners of private cars for transportation of bituminous coal and in favor of competitors owning private cars for fuel oil and other commodities is without merit

A similar contention was made by the joint mine owners in the *New River case*, 265 U. S. 533, supra, and was apparently not considered by this court of enough significance to be referred to in its opinion. The proceeding before the Commission here under consideration involved the question of unreasonable and preferential practices in respect to the distribution of cars for the transportation of bituminous coal. The order purports to deal with this situation, and whether or not there is undue preference or unreasonable practices in connection with pri-

vate cars used for transporting other commodities is a question which may be submitted in the appropriate manner to the Commission. It is a matter which, we submit, has no place in this case.

**(b) Contention that private car owners have rights under the laws of Pennsylvania which preclude the Commission from making its order is also without merit**

In overruling a similar contention as to the rule prescribed in the *Traer case*, the court in *C. & A. v. I. C. C.*, 173 Fed. 930, said, among other things:

> In case of a conflict with a rule for the protection of interstate commerce, which has been duly made by the Interstate Commerce Commission, local constitutions, statutes, orders of railway commissions, and regulations of the carriers, all must give way.

That court's decision in respect to private cars, as previously pointed out, was not disturbed when the case reached this court. *U. S. v. Ill. Cent.*, 215 U. S. 452, supra. See the *Logan Coal Co. case*, 154 Fed. 497, 501, 502, supra. See also *Colorado v. U. S.*, 271 U. S. 153, and *U. S. v. New York Central*, — U. S. —, decided November 22, 1926.

## CONCLUSION

Congress and this court have long recognized that the problems of coal-car distribution are exceedingly difficult and complicated. Congress has recognized this by conferring broad administrative powers upon the Commission to deal with such

problems; the court, by liberally construing such powers. A grave problem has been the assigned car. By the rule prescribed in the *Hocking Valley case,* 12 I. C. C. 398, and the *Traer case,* 13 I. C. C. 451, the Commission sought to restrict the evils arising from the use of the assigned car. The Commission's authority to do this is unquestioned. By the order here involved the Commission has required the removal entirely of the unreasonable and unduly preferential practice which it restricted in those cases and has given effect to the fundamental principle of fairness and equality of treatment contained in the act.

The Commission's investigation was painstaking and thorough. All persons in interest were given full opportunity to be heard. The evidence submittted was ample to support its findings, and its action was well within the limits of its authority. It has eliminated a long existing evil in the matter of coal-car distribution and performed a service of much importance to the public.

We respectfully submit that the decrees of the lower court should be reversed and the bills of complaint in these cases should be dismissed.

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